# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

## No. 160.

J. B. THOMPSON, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY BY T. C. ALBERTSON, REVENUE AGENT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED NOVEMBER 26, 1907.

(20,466.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1907.

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1 Pleas before the Honorable The Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the thirteenth day of June, A. D. 1906.

Be it remembered that on the 7th day of September A. D. 1905, the appellant by his attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record herein and which is in words and figures as follows—

2 Franklin Circuit Court.

Filed Dec. 5, 1903.

THE COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Plaintiff,

*vs.*

JOHN B. THOMPSON, Defendant.

*Petition.*

The plaintiff, the Commonwealth of Kentucky, says that the defendant Jno. B. Thompson is the owner or proprietor of a bonded warehouse in which distilled spirits is stored, and as such, in 1898, as required by law, reported the quantity of spirits on which the government tax had been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which such spirits were assessed for taxation and the number of packages and their value as assessed, and by such reports, which were verified as the law directs, there were shown to be due the plaintiff, The Commonwealth of Kentucky, as taxes, exclusive
3 of any interest, the sum of —— dollars for the year 1898.

Plaintiff says that the sum so reported as taxes due was incorrect in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse, amounting for said year, at time of report, to the sum of Seventy five & 66/100 dollars.

Therefore plaintiff says that there was due it for taxes and interest for the year 1898 the sum of —— dollars, and that defendant only paid —— dollars, leaving due the sum of Seventy five & 66/100 dollars, for which sum, and interest thereon from January 1st, 1899, until paid, and in addition thereto a penalty of eight (8) per cent. thereon, as provided by section 4112 Ky. Statutes, amounting to Six dollars, plaintiff prays judgment.

The plaintiff, The Commonwealth of Kentucky, says that the defendant John B. Thompson is the owner or proprietor of a bonded warehouse in which distilled spirits is stored, and as such, in 1899, as required by law, reported the quantity of spirits on which
4 the government tax had been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which such spirits were assessed for tax-

ation and the number of packages and their value as assessed, and by such reports, which were verified as the law directs, there were shown to be due the plaintiff, The Commonwealth of Kentucky, as taxes, exclusive of any interest, the sum of —— dollars for the year 1899.

Plaintiff says that the sum so reported as taxes due was incorrect in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse, amounting for said year, at the time of report, to the sum of one hundred sixty eight and 80/100 dollars.

Therefore plaintiff says that there was due it for taxes and interest for the year 1899 the sum of —— dollars, and that defendant only paid —— dollars, leaving due the sum of one hundred sixty eight and 80/100 dollars, for which sum, and interest thereon from Jan. 1, 1900, until paid, and in addition thereto a penalty
5 of eight (8%) per cent. thereon, as provided by section 4112 Ky. Statutes, amounting to thirteen and twenty four one hundredths dollars, plaintiff prays judgment.

The plaintiff, The Commonwealth of Kentucky, says that the defendant, John B. Thompson, is the owner or proprietor of a bonded warehouse in which distilled spirits is stored, and as such, in 1900, as required by law, reported the quantity of spirits on which the government tax has been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which such spirits were assessed for taxation and the number of packages and their value as assessed, and by such reports, which were verified as the law directs, there were shown to be due the plaintiff, the Commonwealth of Kentucky, as taxes, exclusive of any interest, the sum of —— dollars for the year 1900.

Plaintiff says that the sum so reported as taxes due was incorrect in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse, amounting for said year, at time of report, to the sum of two hundred
6 ninety three & 24/100 dollars.

Therefore plaintiff says that there was due it for taxes and interest for the year 1— the sum of —— dollars, and that defendant only paid —— dollars due the sum of two hundred ninety three & 34/100 dollars, for which sum, and interest thereon from January 1, 1901, until paid, and in addition thereto a penalty of eight (8) per cent. thereon, as provided by section 4112 Ky. Statutes, amounting to twenty three & 44/100 dollars. Plaintiff prays judgment.

The plaintiff, The Commonwealth of Kentucky, says that the defendant John B. Thompson is the owner or proprietor of a bonded warehouse in which distilled spirits is stored, and as such, in 1901, as required by law, reported the quantity of spirits on which the government tax had been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which such spirits were assessed for taxation and the number of packages and their value as assessed, and by such reports,
7 which were verified as the law directs, there were shown to be due the plaintiff, The Commonwealth of Kentucky, as

taxes, exclusive of any interest, the sum of —— dollars for year 1901.

Plaintiff says that the sum so reported as taxes due was incorrect in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse, amounting for said year, at time of report, to the sum of one hundred fifty one & 60/100 dollars.

Therefore plaintiff says that there was due it for taxes and interest for the year 1901 the sum of —— dollars, and that defendant only paid —— dollars, leaving due the sum of one hundred and fifty one & 60/100 dollars, for which sum, and interest thereon from Jan. 1, 1902, until paid, and in addition thereto a penalty of eight (8) per cent. thereon, as provided by section 4112 Ky. Statutes, amounting to twelve and 8/100 dollars, Plaintiff prays judgment.

8 The plaintiff, The Commonwealth of Kentucky, says that the defendant John B. Thompson is the owner or proprietor of a bonded warehouse in which distilled spirits is stored, and as such, in 1902, as required by law, reported the quantity of spirits on which the government tax had been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which such spirits were assessed for taxation and the number of packages and their value as assessed, and by such reports, which were verified as the law directs, there were shown to be due the plaintiff, The Commonwealth of Kentucky, as taxes, exclusive of any interest the sum of —— dollars for the year 1902.

Plaintiff says that the sum so reported as taxes due was incorrect in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse, amounting for said year, at time of report, to the sum of one hundred forty three & 95/100 dollars.

9 Therefore plaintiff says that there was due it for taxes and interest for the year 1902 the sum of —— dollars, and that defendant only paid —— dollars leaving due the sum of one hundred forty and three & 95/100 dollars, for which sum, and interest thereon from January 1, 1903, until paid, and in addition thereto a penalty of eight (8) per cent. thereon, as provided by section 4112 Ky. Statutes, amounting to eleven and 44/100 dollars, Plaintiff prays judgment.

Plaintiff says that T. C. Albritton, Revenue Agent at large for the State of Kentucky, has been directed by the Auditor of Public Accounts to institute proceedings to collect the taxes and penalties above, and that as compensation to said Albritton for his services the plaintiff is entitled to recover and collect for the benefit of said T. C. Albritton a penalty of twenty (20) per cent. on the taxes and interest due as above set out, amounting to —— dollars, for which sum it prays judgment, and it prays for all proper relief.

WHITE & RAY, *Attorneys.*

10 Franklin Circuit Court.

Jan. 22, 1904.

COMMONWEALTH OF KENTUCKY, by, &c.,
*vs.*
JOHN B. THOMPSON.

Came the plaintiff by attorney and filed its amended petition in the above styled action.

Franklin Circuit Court.

Filed Jan. 22, 1904.

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiff,
*vs.*
JOHN B. THOMPSON, Defendant.

*Amended Petition.*

Amendment to Paragraph One.

The plaintiff amends its petition herein in compliance with the order of this court to make same more specific and says that
11 the tax rate assessed and fixed by the plaintiff for the period of years within the scope of these taxes was as follows: for 1892, 47½ cts.; for 1893, 4-5 and 6, 42½ cents; for 1897-8 and 9, 52½ cents; for 1900 and 1901, 47½ cents; for 1902 and 3, 50 cents on each $100 of valuation, and that the valuation fixed by the State Board of Valuation on distilled spirits for the various years was as follows: for 1892 and 3, $11; for 1894, $10; for 1895-6 and 7 at $8; for 1898 and 1899, $7; for 1900, 1901-2 and 3 at $8 for each barrel. That the defendant reported withdrawals of whisky and made payments of tax thereon as shown by the statements below, upon which interest as claimed in the petition was calculated.

| No. of packages. | When placed in bond. | When withdrawn. | Am't of tax. |
|---|---|---|---|
| 713 | 11/14/92 ..... | Sep. 15, 1898 ..... | $185.02 |
| 1382 | 9/14/93 ..... | " 15, " ..... | 286.42 |
| | | | $471.44 |

12 Amendment to Paragraph 2.

The plaintiff amends its petition herein in compliance with the order of this Court to make more specific and says that the tax rate assessed and fixed by the plaintiff for the period of years within the scope of these taxes was as follows: For 1892, 47½ cents; for

1893-4-5 and 6, 42½ cents; for 1897, 8 and 9, 52½ cents; for 1900 and 1901, 47½ cents; for 1902 and 3, 50 cents on each $100 of valuation, and that the valuation fixed by the State Board of Valuation on distilled spirits for the various years was as follows: For 1892 and 3, $11; for 1894, $10; for 1895-6 and 7 at $8; for 1898 and 1899, $7; for 1900, 1901-2 and 3 at $8 for each barrel. That the defendant reported withdrawals of whiskey and made payments of tax thereon as shown by the statements below, upon which interest as claimed in the petition was calculated.

13

| No. of packages. | When placed in bond. | When withdrawn. | Am't of tax. | No. of packages. | When placed in bond. | When withdrawn. | Am't of tax. |
|---|---|---|---|---|---|---|---|
| 908 | 11, 14, '92 | Sept. '99 | $264.01 | 609 | 11, 14, '92 | Dec. '99 | $199.45 |
| 1033 | 11, 14, '93 | " " | 252.05 | 270 | 9, 14, '93 | " " | 75.99 |
| 1 | 11, 14, '94 | " " | .19 | | | | $275.24 |
| | | | $516.25 | | | | |

Amendment to Paragraph 3.

The plaintiff amends its petition herein in compliance with the order of this Court to make same more specific and says that the tax rate assessed and fixed by the plaintiff for the period of years within the scope of these taxes was as follows: for 1892, 47½ cents; for 1893-4-5 and 6, 42½ cents; for 1897-8 and 9, 52½ cents; for 1900 and 1901, 47½ cents; for 1902 and 3, 50 cents on each $100

14 valuation, and the valuation fixed by the State Board of Valuation on distilled spirits for the various years was as follows: For 1892 and 3, $11; for 1894, $10; for 1895-6 and 7 at $8; for 1898 and 1899, $7; for 1900, 1901-2 and 3 at $8 for each barrel.

That the defendant reported withdrawals of whisky and made payments of tax thereon as shown by the statements below, upon which interest as claimed in the petition was calculated.

| No. of packages. | When placed in bond. | When withdrawn. | Amt. of tax. | No. of packages. | When placed in bond. | When withdrawn. | Amt. of tax. |
|---|---|---|---|---|---|---|---|
| 1190 | 11, 14, '92 | M'ch. 1900 | $339.92 | 825 | 9, 14, '93 | Dec. 1900 | $260.48 |
| 66 | 9, 14, '93 | " " | 18.54 | | | | |
| | | | 408.26 | | | | |
| 425 | 11, 14, '92 | Apr. 1900 | 139.19 | | | | |
| 61 | 9, 14, '93 | " " | 17.11 | | | | |
| | | | 156.40 | | | | |
| 1117 | 11, 14, '92 | Aug. 1900 | 365.82 | | | | |
| 312 | 9, 14, '93 | " " | 87.59 | | | | |
| | | | $453.41 | | | | |

15 Amendment to Paragraph —.

The plaintiff amends its petition herein in compliance with the order of this Court to make same more specific and says that the tax rate assessed and fixed by the plaintiff for the period of years within the scope of these taxes was as follows: for 1892, 47½ cents; for 1893-4-5 and 6, 42½ cents; for 1897-8 and 9, 52½ cents; for 1900 and 1901, 47½ cents; for 1902 and 3, 50 cents on each $100 of valuation and that the valuation fixed by the State Board of Valuation on distilled spirits for the various years was as follows: For 1892 and 3, $11; for 1894, $10; for 1895-6 and 7 at $8; for 1898 and 1899, $7; for 1900, 1901-2 and 3 at $8 for each barrel. That the defendant reported withdrawals of whisky and made payments of tax thereon as shown by the statements below, upon which interest as claimed in the petition was calculated.

16 1901.

| No. of packages. | When placed in bond. | When withdrawn. | Am't of tax. | No. of packages. | When placed in bond. | When withdrawn. | Am't of tax. |
|---|---|---|---|---|---|---|---|
| 1778 | Sep. 14, 1893 | Apr., 1901 | $560.50 | 254 | Sep. 14, '93 | Aug., 1901 | 80 02 |
| | | | | 6 | " " '94 | " " | 1.62 |
| 8 | 9, 14, '94 | Dec., 1901 | $2.45 | | | | $81.64 |
| 1 | 9, 14, 1901 | " 1901 | .03 | | | | |
| | | | $2.48 | | | | |

17 Amendment to Paragraph —.

The plaintiff amends its petition herein in compliance with the order of this Court to make same more specific and says that the tax rate assessed and fixed by the plaintiff for the period of years within the scope of these taxes was as follows: for 1892, 47½ cents; for 1893-4-5 and 6, 42½ cents; for 1897-8 and 9, 52½ cents; for 1900 and 1901, 47½ cents; for 1902 and 3, 50 cents on each $100 of valuation, and the valuation fixed by the State Board of Valuation on distilled spirits for the various years was as follows: For 1892 and 3, $11; for 1894, $10; for 1895-6 and 7 at $8; for 1898 and 1899, $7; for 1900, 1901-2 and 3 at $8 for each barrel. That the defendant reported withdrawals of whisky and made payment of tax thereon as shown by the statements below, upon which interest as claimed in the petition was calculated.

18 1902.

| No. of packages. | When placed in bond. | When withdrawn. | Am't of tax. |
|---|---|---|---|
| 552 | Sep. 14/94..... | Apr. 1902..... | $169.00 |
| 1406 | Sep. 14/1904..... | Aug. 1902..... | 430.94 |

WHITE & RAY, *Att'ys.*

19 *Ordinary Summons.*

The Commonwealth of Kentucky to the Sheriff of Mercer County, Greeting:

You are commanded to summon John B. Thompson to answer in twenty days after the service of the summons, a petition filed against him in the Franklin Circuit Court by the Commonwealth of Kentucky, by T. C. Albritton, Revenue Agent and warn him that upon failure to answer, the petition will be taken for confessed, or he will be proceeded against for contempt, and you will make due return of this summons within twenty days after the service thereof to the Clerk's office of said Court.

Witness, J. R. Elliott, Clerk of said Court, this 5th day of December 1903.

J. R. ELLIOTT, *Clerk.*

(Endorsed:) Executed by delivering to John B. Thompson a true copy of the within summons this Feb. 13, 1904. G. P.
20 Chinn, S. M. C., By J. W. Davenport, D. S.

Franklin Circuit Court.

Sept. 24, 1904.

COMMONWEALTH OF KENTUCKY
*vs.*
JOHN B. THOMPSON.

A special term of this court is hereby ordered and called to commence on the second Monday (14th day) of November 1904 at 9 o'clock A. M. for the purpose of hearing motions, orders, and judgments in the above styled cause (and 501 other cases).

21 Franklin Circuit Court.

Nov. 17, 1904.

COMMONWEALTH OF KENTUCKY
*vs.*
JOHN B. THOMPSON.

Came the defendant by attorney in the above styled cause and offered to file his answer herein, to the filing of which plaintiff objected, the objections being heard by the Court the same was overruled and the answer filed to which the plaintiff excepts, in filing answers herein defendants do not waive the motions and demurrers pending herein.

Franklin Circuit Court.

Filed Nov. 17, 1904.

22 No. —.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Plaintiff,
*vs.*
J. B. THOMPSON, Defendant.

*Answer.*

The defendant, J. B. Thompson, now comes and, without waiving, but still insisting and relying upon all of its motions and demurrers heretofore filed, and because only of the order of Court limiting its time for answer, herein says:

It denies that the sums, or any of them, reported by it as taxes due upon whiskeys withdrawn from Warehouse No. 63, in Mercer County, in the Eighth District of Kentucky, being the warehouse referred to in the petition, was incorrect.

It denies that there was any accumulated interest on said taxes, or any of them, while the spirits remaining in the United States Bonded Warehouse, amounting to the sum of $—, or any other sum whatever.

Paragraph No. 2.

23 Defendant denies that there was due plaintiff for taxes and interest for the year —— the sum of $— or any other sum beyond that which was duly paid to plaintiff and credited by plaintiff as set out in the petition; it denies that there is due plaintiff the sum of $— or any part thereof with interest from any date whatever; it denies that there is due plaintiff a penalty of 8 per cent. on said sum, or any penalty on any sum whatever; it denies that plaintiff is entitled to recover or collect for the benefit of T. C. Albritton, a penalty of 20 per cent. or any other per cent.

on the said amounts sought to be recovered as unpaid taxes or interest on taxes as set out in the petition, amounting to $— or any sum whatever; and it denies that it is indebted to plaintiff for any cause in any sum whatever.

Paragraph No. 2 A.

Defendant denies that there was due plaintiff for taxes and interest for the year ——, the sum of $— or any other sum beyond that which was duly paid to plaintiff and credited by plaintiff as set out in the petition; it denies that there is due plaintiff the
24 sum of $— or any part thereof with interest from any date whatever; it denies that there is due plaintiff a penalty of eight per cent. on said sum, or any penalty on any sum whatever; it denies that plaintiff is entitled to recover or collect for the benefit of T. C. Albritton, a penalty of 20 per cent. or any other per cent. on the said amount sought to be recovered as unpaid taxes or interest on taxes as set out in the petition, amounting to $— or any sum whatever; and it denies that it is indebted to plaintiff for any cause in any sum whatever.

Paragraph No. 2 B.

Defendant denies that there was due plaintiff for taxes and interest for the year —— the sum of $— or any other sum beyond that which was duly paid to plaintiff and credited by plaintiff as set out in the petition; it denies that there is due plaintiff the sum of $— or any part thereof with interest from any date whatever; it denies that there is due plaintiff a penalty of 8 per cent. on said sum, or any penalty on any sum whatever; it denies that plaintiff is entitled to recover or collect for the benefit of T. C. Al-
25 britton, a penalty of 20 per cent. or any other per cent. on the said amount sought to be recovered as unpaid taxes or interest on taxes as set out in the petition, amounting to $— or any sum whatever; and it denies that it is indebted to plaintiff for any cause in any sum whatever.

Paragraph No. 2 C.

Defendant denies that there was due plaintiff for taxes and interest for the year —— the sum of $— or any other sum beyond that which was duly paid to plaintiff and credited by plaintiff as set out in the petition; it denies that there is due plaintiff the sum of $— or any part thereof with interest from any date whatever; it denies that there is due plaintiff a penalty of 8 per cent. on said sum, or any penalty on any sum whatever; it denies that plaintiff is entitled to recover or collect for the benefit of T. C. Albritton, a penalty of 20 per cent. or any other per cent. on the said amount sought to be recovered as unpaid taxes or interest on taxes as set out in the petition, amounting to $— or any sum whatever;
26 and it denies that it is indebted to plaintiff for any cause in any sum whatever.

Paragraph No. 2 D.

Defendant denies that there was due plaintiff for taxes and interest for the year —— the sum of $— or any other sum beyond that which was duly paid to plaintiff and credited by plaintiff as set out in the petition; it denies that there is due plaintiff the sum of $— or any part thereof with interest from any date whatever; it denies that there is due plaintiff a penalty of 8 per cent. on said sum, or any penalty on any sum whatever; it denies that plaintiff is entitled to recover or collect for the benefit of T. C. Albritton, a penalty of 20 per cent. or any other per cent. on the said amounts sought to be recovered as unpaid taxes or interest on taxes as set out in the petition, amounting to $— or any sum whatever; and it denies that it is indebted to plaintiff for any cause in any sum whatever.

Paragraph No. 2 E.

Defendant denies that there was due plaintiff for taxes and interest for the year —— the sum of $— or any other sum
27 beyond that which was duly paid to plaintiff and credited by plaintiff as set out in the petition; it denies that there is due plaintiff the sum of $— or any part thereof with interest from any date whatever; it denies that there is due plaintiff a penalty of 8 per cent. on said sum or any penalty on any sum whatever; it denies that plaintiff is entitled to recover or collect for the benefit of T. C. Albritton, a penalty of 20 per cent. or any other per cent. on the said amount sought to be recovered as unpaid taxes or interest on taxes as set out in the petition, amounting to $— or any sum whatever; and it denies that it is indebted to plaintiff for any cause in any sum whatever.

Paragraph No. 3.

Defendant further answering says that it did at all times as required by law, on or about the 1st day of January, May and September of each year, make the reports mentioned and referred to in the plaintiff's petition herein, of the spirits on which the United States Internal Revenue Tax was due or had been paid, or which
28 spirits had been removed from said Bonded Warehouse during each four months of the year preceding each report, and the amount of taxes due the plaintiff, under the terms of said act, on the spirits so reported. That such reports were in every instance made by defendant upon blank form furnished by plaintiff, every question asked in which blank form and every blank space in which, were fully and truthfully answered and filled by this defendant; which reports were carefully and fully examined by plaintiff and its said Auditor and were verified and approved by them and the amounts of taxes paid with the respective reports were accepted by plaintiff and its said Auditor and its Treasurer in full satisfaction of all claims and demands of plaintiff on account of taxes on said spirits so withdrawn, and thereupon receipts issued by said Auditor

for and on behalf of plaintiff and with plaintiff's knowledge, consent and approval, in full satisfaction of plaintiff's said claims were given to defendant, and neither the plaintiff nor its said Auditor or any other officer or agent of plaintiff ever at any time or by
29 any means, until the institution of this action, indicated that plaintiff claimed or demanded or construed the law to require of defendant the payment of any interest on the taxes so promptly paid when due as aforesaid; that all said reports are now on file in the office of said Auditor and or in the control of plaintiff and plaintiff is now called upon to produce and file the same, or certified copies of same, in this action.

Defendant says that Auditor of Public Accounts was and is the officer of plaintiff authorized, empowered and charged with the duty of supervising the collection of all said taxes on distilled spirits, and adjusting and settling the claims and accounts therefor; that by reason of the acts of plaintiff and its said Auditor and treasurer as aforesaid, and the acceptance of the principal sum of said taxes without any interest or penalty in full satisfaction of plaintiff's claim, the plaintiff should not now be permitted to recover any other or further sum; that such recovery would be inequitable, un-scionable and unjust; that any recovery by plaintiff would be a total loss to defendant, and plaintiff is now estopped to claim or demand of defendant any sum whatever as interest or penalties on the principle sums so paid as aforesaid.

30 Paragraph No. 4.

Further answering defendant says that ever since the passage of the act approved Nov. 11, 1892, entitled "An act relating to revenue and taxation" and down to the time of the institution of this action, the Auditor of Public Accounts, of the State of Kentucky, three times in every year and immediately preceding the first days of January, May and September, in each year, sent to every owner or proprietor of a United States Bonded Warehouse in the State of Kentucky, in which distilled spirits were stored, and likewise since the organization of this defendant and beginning with May, 1899, he has sent to this defendant three times in each year, blank forms to be filled in by the recipient, thereof, sample of which is herewith filed and made part hereof marked Exhibit No. 1 which blank forms so completed were required to be returned as provided by law to said Auditor, as a report of the spirits withdrawn from such Bonded Warehouse, and upon which spirits plaintiff claimed its taxes were due under the terms of said act, accompanied by a sum of money to be paid into the treasury to satisfy said taxes. Upon said
31 blank form there was provided only space for reporting the principle sum claimed by plaintiff as taxes, and no provision was made for reporting any sum as interest. That on or before the 5th day of January, May and September respectively, in each and every year since it purchased said Warehouse, this defendant filled in said blank form, making true and correct report thereon, as required by law, and with each report caused to be paid to plaintiff all

taxes then claimed by plaintiff on the spirits so withdrawn from said bonded warehouse and so reported as withdrawn, upon the payment of the taxes due the United States during the respective periods of four months preceding, and the said Auditor of Public Accounts in the name and for and in behalf of the plaintiff, did thereupon, in each instance, give to this defendant, a quietus or receipt in full for all taxes then claimed by defendant on said spirits, and neither the plaintiff nor its said Auditor demanded of defendant any other or further sum whatever as taxes, interest on taxes, or penalties, on said spirits, or indicated to defendant by any means whatever
32 that its entire claim upon said spirits, and the cause of taxes thereon, were not fully and finally satisfied, by the payments made at the respective times as aforesaid:

That during all said times since the blank day of March, 1892, the law was so construed by plaintiff and each and all of its officers and agents as to require the payment only of the principle sum of said taxes on or before the 5th day of January, May and September of each of said respective years, at the time of filing of said respective reports, being the amounts which were then respectively paid to the plaintiff, in full satisfaction of its respective claims made at the time; and this construction of the law has been adopted and followed by the Commonwealth of Kentucky, by its chief officers and agents in charge of this branch of its business, viz: its Auditor of Public Accounts, and its treasurer, by three successive legislatures which have met and amended said law, knowing and approving the construction which had been put thereon, and by all state and county officials and departments of the State Government charged in any
33 way with the enforcement of the law, and by the public generally, and especially those interested in the enforcement of said law, which construction was immediately put upon said law after its enactment, and has continued to be put thereon uniformly, universally and practically ever since; and, therefore, plaintiff is now estopped from claiming from defendant at this time, the alleged interest or penalties claimed in the petition, the collection of which would be unjust, unconscionable and unlawful for the reasons aforesaid.

Paragraph No. 5.

Further answering defendant says that the plaintiff and the said Auditor of Public Accounts and all other officers and agents in any way interested in the collection of plaintiff's revenues, have continuously, since the passage of said act of Nov. 11, 1892, so construed said act and the subsequent act known as the revenue law, which was enacted March 29, 1902, in such manner that no interest or penalties of any kind or in any amount were ever exacted of this defendant, or of any other owner or proprietor of a Bonded Warehouse in the state of Kentucky, when the taxes on distilled spirits
34 which had been stored therein became due and were paid at the proper time in January, May and September, of each and every year; and upon the respective payments of said taxes, the per-

sons so paying the same, including this defendant, did receive a quietus for all sums claimed by plaintiff as due to it on account of taxes against said spirits so withdrawn; that all of said spirits, the taxes upon which were so caused to be paid by this defendant were the property of and belonged to others than this defendant; that all said spirits were owned by persons who were non-residents of the State of Kentucky; that none of said spirits had at any time ever been in the possession or custody of this defendant; that none of said spirits had been assessed against this defendant or in its name; that defendant was neither the owner nor proprietor of the warehouse in which said whiskeys were stored at the time any taxes were assessed against the same; that it was not the owner or proprietor of said warehouse on September 15, of any year for which said taxes were assessed; that it at no time ever owned or had any interest in said spirits from the time they came into existence until they were
35 shipped by the owners out of the State of Kentucky. That under the provisions of said acts the person who paid said taxes or furnished the money to pay same, would have been entitled to a lien upon said spirits to secure the amount so paid in each case, and likewise would have had and been entitled to a lien upon said spirits to secure the amount so paid as interest and penalties if any had been exacted at the time, and to enforce said lien possession could have been taken and held of said spirits, but by reason of and relying upon the constructions so placed as aforesaid upon said acts, defendant, believing that all claims of plaintiff against said spirits had been fully satisfied, permitted the owner thereof to withdraw and ship the same without the State of Kentucky, without the payment of any such interest or penalties, and said spirits have long since been consumed, or their identity lost and the same cannot now be found, and if found are out of the jurisdiction of the Courts of this State; and any lien given by the law to this defendant
36 upon said spirits to secure the payment of plaintiff's demand as herein made has been lost, and any sum recovered by plaintiff will therefore be a total loss to this defendant, that no sum whatever to cover any part of such interest or penalties has been received by defendant from any of the owners of said spirits; that said spirits were owned by many hundred different people who were all non-residents of the State of Kentucky, many of whom are now dead and many are insolvent; that the quantity of spirits owned by said respective owners was in every case so small that the cost to defendant to recover from them their respective shares of plaintiff's claim, would be more than the amount which would be recovered, if recovery could in fact now be had, and therefore whatever amount plaintiff recovers from defendant herein will be a total loss to this defendant.

Paragraph No. 6.

For answer, defendant says it was not in possession of the distilled spirits referred to by plaintiff in its petition on the 15th day
37 of September, 1899, or before that time, or any time thereafter, and while the same still remains in the United States

Bonded Warehouse, and no part of said spirits where in the possession, custody or control of this defendant on the 15th day of September, 1899, or at any subsequent time or prior thereto, that said distilled spirits and no part of them were ever assessed by defendant or were possessed or controlled by him at any time. That said spirits were produced and entered in the said Bonded Warehouse, in accordance with the laws of the United States and the rules and regulations of the Treasury Department made in pursuance thereof and were held by the United States as sole custodians thereof until the United States Internal Revenue Tax was paid thereon to it. Said spirits were delivered at the time of payment of said tax to the respective owners thereof. That from the time said spirits were produced until the said Internal Revenue Taxes were paid thereon and said spirits were surrendered to said owner by the United States, the same were at all times in the sole possession and custody of the United States.

The said spirits were so possessed and held in bonded Warehouses in the sole possession of the United States, on Sept. 15th, of
38 each and every year the annual day for assessment of taxes in each and every year, and at all times while said spirits remained in the United States distillery Bonded Warehouses.

Defendant says that while said spirits were thus in the sole custody and possession of the United States in Warehouses in their sole possession, the same were not in the jurisdiction of the State of Kentucky nor subject to taxation by the state of Kentucky for any purpose whatever, nor by any county, city or other municipality thereof.

Paragraph No. 7.

Further answering defendant says that under the terms and provisions of the acts of congress of the United States providing for the assessment and collection of internal revenue to support the National Government, the United States have taken complete and absolute supervision and control of the manufacture and warehousing of distilled spirits, from the time the grain, out of which said spirits are produced, goes upon the distillery premises, until
39 the United States taxes are fully paid upon the finished product the said distillery premises, the grain out of which the spirits are produced, the spirits in every stage of manufacture and the warehouse in which the spirits are stored for the purpose of being matured and ripened ready for market, all were and continued at all times to be in the absolute and sole custody of the United States and their officials. In return for this interference with the possession of property by its otherwise rightful owner, the United States have guaranteed to the maker and owner of such spirits that the same might so remain after production, in the custody and keep of the United States and under their protective care for a period not exceeding eight years, during which period such spirits are not subject to any process from any Court or in the hands of any official, of any state or municipality of any kind whatsoever. That no State can levy upon said spirits in the custody of the United States for any taxes assessed for any purpose, nor can any State,

by affixing a penalty for the non-payment of its taxes annually or otherwise, force such owners of distilled spirits to pay taxes
40 thereon annually; nor can any state by levying taxes upon such spirits and affixing an annual penalty for the non-payment of same, accomplish by indirection what it cannot do directly; nor can any State provide laws for the annual taxation of such spirits and provide an annual penalty to be added thereto, which tax and penalty can only be satisfied by the owner of such spirits after he had paid the United States Internal Revenue Tax, thus forcing the owner of such spirits to lose the benefit of the protective care of his whiskey for eight years, which the United States guarantees to him, and the benefit of the time which the law allows him for the payment of such internal revenue tax, or submit, at the end of the bonded period, to the payment of taxes and accumulated penalties which could not be lawfully discharged until the said Internal Revenue Tax has been fully paid and the spirits taken from the custody of the United States. That if the act of the legislature of Kentucky, under which plaintiff seeks to recover herein, is construed as the same must be construed to enable plaintiff to make recovery, such act would be and is an unwarranted inter-
41 ference with the scheme and plan of the United States Government, which has been enforced for forty years, by which it raises enormous revenue from this particular species of property, assessing the same at more than five times its cost of production and intrinsic value, in order to do which it has seen fit to take absolute and exclusive control, possession and supervision of said property in all stages of its manufacture and existence. The said acts therefore, if construed as they must be to enable plaintiff to make recovery, are null and void, and if enforced would deprive this defendant and all owners of such spirits, of the rights and privileges secured and guaranteed to them by the Constitution and laws of the United States; said acts would be in direct conflict with and would deprive this defendant of the rights secured to it by the first clause of the fourteenth amendment to the Constitution of the United States, which provides that no State shall abridge the privileges or immunities of citizens of the United States, nor deprive any persons of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 Paragraph No. 8.

Further answering defendant says that under the terms and provisions of the acts of Congress of the United States providing for the assessment and collection of internal revenue to support the national government, the United States have taken complete and absolute supervision and control of the manufacture and warehousing of distilled spirits and this subject matter by these laws has become one of the agencies and means designated, selected and set apart for the purpose its functions as a sover-nty. From the time the grain, out of which said spirits are produced, goes upon the distillery premises, until the United States taxes are fully

paid upon the finished product, the said distillery premises, the grain out of which the spirits are produced, the spirits in every stage of manufacture and the warehouse in which the spirits are stored for the purpose of being matured and ripened ready for market, all were and continued at all times to be in the absolute and sole custody of the United States and their officials. In return for this interference with the possession of the property by
43 its otherwise rightful owner, the United States have guaranteed to the maker and owner of such spirits that the same might remain, after production in the custody and keep of the United States and under their protective care for a period not exceeding eight years, during which period said spirits are not subject to any process from any Court or in the hands of any official of any state or municipality of any kind whatsoever. That the state, nor any county or municipality thereof cannot assess such distilled spirits stored and held as aforesaid for taxes for any purpose nor can it levy upon such spirits in the custody of the United States for any taxes assessed for any purpose, nor can the State, by affixing a penalty for the nonpayment of its taxes, or by any other means, force such owners of distilled spirits to pay taxes thereon annually or at any other time; nor can they by levying taxes upon such spirits and affixing an annual penalty for the non-payment of same, accomplish by indirection what they cannot do directly; nor can the State provide laws for the annual taxation of such spirits and provide a penalty to be
44 added thereto, which tax and penalty can only be satisfied by the owner of such spirits after he had paid the United States Internal Revenue Tax. That the state cannot by law compel the distiller or owner of such spirits to pay the United States taxes assessed thereon before the same was due.

The option given the distiller and owner by the government cannot be taken from him as to the time of the payment of the taxes nor cannot be taken from him by the State for the purposes of taxation by the State and to lose the benefit of the protective care of his whiskey for eight years or any part thereof, which the United States guarantees to him, and the benefit of the time which the law allows him for the payment of such Internal Revenue Tax, or submit, at the end of the bonded period, to the payment of taxes and accumulated penalties which could not be discharged until the said Internal Revenue Tax has been fully paid and the spirits taken from the custody of the United States. That if the act of the legislature of Kentucky, under which plaintiff seeks to recover herein is construed as the same must be construed to enable the plaintiff to make recovery, such act would be and is an
45 unwarranted interference with the scheme and plan of the United States Government, which has been in force for forty years, by which it raises enormous revenue from this particular species of property, assessing the same at more than five times its cost of production and intrinsic value, in order to do which it has seen fit to take absolute and exclusive control, possession and supervision of said property in all stages of its manufacture and exist-

ence. The said acts therefore, if construed as they must be to enable plaintiff to make recovery, are null and void, and if enforced would deprive the defendant and all owners of such spirits of the rights and privileges secured and guaranteed to them by the Constitution and the laws of the United States; said acts would be in direct conflict with and would deprive this defendant of the rights secured to it by the first clause of the fourteenth amendment to the Constitution of the United States, which provides that no State shall abridge the privileges or immunities of the citizens of the United States, nor deprive any person of life, liberty or
46 property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Paragraph No. 9.

Defendant, further answering, says that no part of the taxes paid upon any of said distilled spirits, either to the United States or to the State of Kentucky was paid by this defendant; said taxes were paid by the owners thereof to defendant as agent and collected by defendant as agent for the State and paid out of funds which were provided by the owners of the respective lots of spirits as they were withdrawn, this defendant, acting solely as the agent in the payment of same.

That no interest was claimed by the State through its officers and agents and this defendant as one of its inferior agents required to collect its demands for taxes collected none.

Therefore if a judgment is rendered against the defendant for the amounts sought to be recovered by plaintiff or for any of them for such interest such judgment would amount to mere spoilation; defendant would be deprived of its property without due process of law and without any legal right whatever; it would be de-
47 feated and deprived of its rights as guaranteed to it by the Constitution and laws of the United States.

Paragraph No. 10.

Defendant further says that the spirits referred to by plaintiff were, from the time they came into being, in the sole and exclusive custody and possession of the United States and its officers and were not within the jurisdiction of the State, nor subject to its dominion nor subject to any process of its laws and were not liable for taxation and could not be taxed by the State of Kentucky nor by any county, City or other municipality thereof for any purpose or reached by any process whatever.

Paragraph No. 11.

That if any and all matters connected with the reporting of withdrawals of spirits and the payment of taxes thereon, as set up by plaintiff in its petition, this defendant did not act solely as the agent of the distiller of said spirits and the warehouseman thereof, then it did act as the agent of plaintiff the Commonwealth

of Kentucky, so constituted against its wish and by virtue
48 of a statute of the said Commonwealth of Kentucky under
and — pursuance to which defendant acted against its will and without any compensation or hope of reward or compensation of any kind whatsoever; but in so acting as plaintiff's agent it acted in an entirely subordinate capacity, being subordinate and inferior to plaintiff's regular chief tax collector, to-wit: The plaintiff's Auditor of Public Accounts which said Auditor was an officer superior to this defendant, and is plaintiff's chief agent in charge of all matters pertaining to its revenues and the collection thereof; that in reporting and collecting taxes as it did, defendant took orders from said Auditor as to the nature of the report to be made and as to the amount of money to be collected for each owner of distilled spirits as the same were withdrawn from the bonded warehouse and as to the amount which plaintiff expected defendant to collect from the respective owners of said spirits and the amount which plaintiff expected to be paid for it; and in all matters connected with said report and the gathering in and payment over of said revenues, the defendant acted under and in exact accordance
with the orders of plaintiff and the plaintiff's said Auditor;
49 that defendant performed its duties fully in every instance
and at all times in accordance with the manner in which said duty was laid down to it by plaintiff and the said superior officers of plaintiff, the said plaintiff's several Auditors of public accounts, all of whose instructions it had the right to and was required to follow, and all of which it did follow fully and exactly in all respects, both in reporting and gathering or collecting and paying over said revenues.

That the defendant reported to the said Auditor the exact and full amount as claimed by plaintiff as due on account of the said several lots of whiskey withdrawn from said several warehouses, and defendant received and paid over to plaintiff and to its said Auditor and to its treasurer, all that was so reported as due and all that plaintiff claimed to be due; all of which was done by the defendant to the full and complete satisfaction of plaintiff and its said Auditor and its said Treasurer, and defendant says it can not now be held by plaintiff for neglect to perform its duty, when at the time of the
performances by defendant of its duty as it was seen by it,
50 plaintiff manifested full satisfaction with the performance of
such duties; and when the same was done and performed by defendant to the full extent and as required by plaintiff to be performed, from time to time; and if said duty was not fully and completely performed as the law requires, any further performance thereof was expressly excused by plaintiff and by its said Auditor and treasurer, being the agents of plaintiff having power so to do, and the actions of said Auditor and Treasurer were with the full knowledge of plaintiff, and with its full acquiescence and approval and under its directions.

Plaintiff says that if there has been any neglect on the part of anybody to do or perform any duty owing to plaintiff by which plaintiff has suffered as set forth in its petition, or to any other ex-

tent, such neglect has been the neglect of plaintiff's Auditor or Treasurer, or both; and to the said Auditor or Treasurer, or both, and their respective bondsmen must plaintiff now look to recover the loss which it claims it sustained by reason of such neglect.

Paragraph No. 12.

51 Defendant further says that under the Constitution of the State of Kentucky all taxation must be uniform within the territory or limits for which the taxes are levied; that no taxes heretofore levied for the State of Kentucky, or any county or municipality thereof, have been made to bear interest before the taxes are due. A tax, therefore, which is made to bear interest before the same is due and payable is unequal and unjust and therefore void. That if the six per cent. per annum sought to be recovered herein is interest, it is an unequal and unjust tax, imposing upon the owner of bonded distilled spirits a burden greater than that imposed by law upon other property. That if said charge of six per cent. per annum is not in fact interest but a penalty, then the same is void because a penalty cannot be charged for the failure to do a thing the doing of which is made impossible by the law itself; and the taxes at the uniform rate fixed by law could not have been paid until the spirits were withdrawn from bonds, therefore, no penalty could attach or begin to run until the spirits were
52 so withdrawn from bond, nor could any interest be charged or begin to run until the spirits were so withdrawn from bond.

Wherefore, having fully answered defendant prays to be dismissed.

J. B. THOMPSON,
*For Defendant.*

The affiant J. B. Thompson says the statements of the foregoing answer are true as he verily believes.

J. B. THOMPSON.

Subscribed and sworn to by J. B. Thompson before me this Nov. 14, 1904.

T. N. LINDSEY,
*Notary Public, Franklin County, Ky.*

My commission expires Jan. 13, 1906.

Franklin Circuit Court.

Nov. 1, 1904.

53 COMMONWEALTH OF KENTUCKY, by, &c.,
*vs.*
JOHN B. THOMPSON.

Came the plaintiff in the above styled cause and filed a demurrer to the amended answer herein.

Franklin Circuit Court.

Filed Nov. 21, 1904.

COMMONWEALTH OF KENTUCKY, by, &c.,
*vs.*
JOHN B. THOMPSON.

*Demurrer to Answer and Amended Answer.*

The plaintiff demurs to the answer and amended answer filed herein and to each paragraph thereof and for cause says that said answer and amendment taken as a whole, separately, nor does either paragraph or combination of paragraphs present a defense to the cause of action and upon this it prays judgment.

Franklin Circuit Court.

Apr. 3, 1905.

54 COMMONWEALTH OF KENTUCKY, by, &c.,
*vs.*
JOHN B. THOMPSON.

Ordered that this cause be set for the 10th day of this Court.

Franklin Circuit Court.

Apr. 13, 1905.

COMMONWEALTH OF KENTUCKY, by, &c.,
*vs.*
JOHN B. THOMPSON.

Ordered that this cause be reassigned for the 15th day.

Franklin Circuit Court.

Filed Apr. 20, 1905.

COMMONWEALTH OF KENTUCKY, by, &c.,
*vs.*
JOHN B. THOMPSON.

*Order.*

55 The demurrer of the plaintiff to the answer and amended answer of the defendant heretofore filed coming on to be heard is sustained, to which ruling the defendant excepts.

*Judgment.*

The Court having sustained the demurrer of the plaintiff to the answer and amended answer of the defendant, except as to the paragraph which denies the amount due the plaintiff and except the paragraph pleading five year limitation, the defendant declines to plead further, but elects to stand by the demurrers and the rulings thereon and the two remaining paragraphs of the answer, (which two paragraphs denies the amount due and pleads limitation as to the year 1898); then on motion of plaintiff, the action having been transferred to equity, the case is submitted for hearing on the pleadings and the Court being advised it is adjudged that the plaintiff recover of the defendant John B. Thompson the sum of eight hundred and forty nine dollars and thirty nine cents ($849.39), being the amount of interest due on taxes on whiskey in bond since and including report of January 1899 up to report of September
56 1903 embraced in this suit, and also being a penalty of eight per cent. on such interest and six per cent. interest per annum from the filing of this action, and also being a penalty of twenty per cent. due the revenue agent—the above amount of $849.39 being the total due from the defendant Thompson in this action, and the plaintiff will recover its costs herein for all of which execution may issue. To all of which ruling and judgment the defendant objects and excepts and prays an appeal to the Court of Appeals which is granted.

Franklin Circuit Court.

JOHN B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, Appellee.

*Supersedeas.*

I do certify that an appeal has been granted by the Franklin Circuit Court from a judgment rendered at its April term, 1905, in favor of Commonwealth of Kentucky, Appellee, against John B. Thompson, Appellant, for Eight Hundred and Forty Nine
57 39/100 dollars and costs, and that a supersedeas bond has been executed. Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said Court, this 26th day of April, 1905.

BEN MARSHALL, *C. F. C. C.*

(Endorsed:) Executed by delivering to John Ray attorney a true copy of the within. This May 5, 1905. A. G. Jeffers, S. F. C. By Harry Jeffers, D. S.

58 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Pl'ff,
*vs.*
J. B. THOMPSON, Def't.

*Power of Attorney.*

I do hereby constitute and appoint D. W. Lindsey, of the City of Frankfort, State of Kentucky, my attorney in fact for me and in my name to execute for me an appeal bond in the above styled case, pending in said court, in which judgment was rendered against me. And to sign, execute and deliver the same for me to have the same effect as if I were personally present and signed and executed the same. I hereby ratify and confirm any and all acts done by my said attorney that are necessary and proper for the purposes aforesaid.

J. B. THOMPSON.

Personally appeared before me J. B. Thompson, who is personally known to me, who executed and acknowledged the above power of attorney, whereupon I have certified the same, as Notary
59 Public in and for County of Jefferson, State of Kentucky. My Commission expires Feb'y 9th, 1908.

ZELLA M. HULSE,
[SEAL.] *Notary Public, Jefferson County, Kentucky.*

60 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Pl'ff,
*vs.*
J. B. THOMPSON, Def't.

*Power of Attorney.*

I, D. Meschendorf, of the City of Louisville, State of Kentucky, do hereby constitute and appoint D. W. Lindsey of the City of Frankfort, State of Kentucky, my attorney in fact for me and in my name to sign, execute and deliver for me, as the security of J. B. Thompson, any bond in the above styled case, pending in said court, in which judgment was rendered against J. B. Thompson, that is necessary and proper for him to take an appeal from said judgment, and any bond when so signed, executed and delivered by my said attorney for me shall have the same effect as if I were personally present to sign and execute the same, and I hereby ratify and confirm any and all acts done or that may be done by my said attorney that are necessary and proper for the purposes aforesaid.

D. MERCHENDORF.

61 Personally appeared before me Daw L. Schlegel a Notary Public for the County of Jefferson, State of Kentucky, D. Merchendorf, who is personally known to me, and who signed, acknowledged and delivered the above power of attorney, whereupon I have certified the same.

*My Commission expires*

[SEAL.] DAW L. SCHLEGEL, *N. P., J. C.*

My Commission expires Feb. 15, 1906.

62 THE COMMONWEALTH OF KENTUCKY:

Franklin Circuit Court.

JOHN B. THOMPSON, Appellant,
*against*
COMMONWEALTH OF KENTUCKY, Appellee.

Upon an Appeal from a Judgment of the Franklin Circuit Court, Rendered 20th Day of April, 1905.

Whereas, Said Appellant John B. Thompson — an appeal from the Judgment of the Franklin Circuit Court, rendered at its April Term, 1905, against him in favor of the Appellee, for the sum of Eight hundred and forty nine and 39/100 dollars and costs of this action and the Appellant desires to supersede the Collection of the said Judgment above mentioned.

Now, we John B. Thompson and D. Merchendorf surety do hereby covenant to and with the Appellee Commonwealth of Kentucky that the Appellant will pay to the Appellee all costs and damages that may be adjudged against the Appellant on the

63 appeal, and also that they will satisfy and perform the full condition of the Judgment above stated, in case it shall be affirmed, and any Judgment or Order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the $849.39 and costs Judgment aforesaid. And also pay all rents, hire or damage, which during the pendency of the appeal, may accrue on any part of the property of which the Appellee is kept out of possession by reason of the appeal.

Witness our hands, this 26th day of April 1905.

J. B. THOMPSON,
By D. W. LINDSEY,
*Att'y in Fact under Powers of Attorney Hereto Attached.*
D. MERCHENDORF,
By D. W. LINDSEY,
*Att'y in Fact under Powers of Attorney Hereto Atached.*

Attest:
BEN MARSHALL, *C. F. C. C.*

64 Franklin Circuit Court.

STATE OF KENTUCKY, *Franklin County, set:*

I, Ben Marshall Clerk of the Franklin Circuit Court, do hereby certify that the foregoing 63 pages contain a true and complete copy of the record and papers in the case wherein Commonwealth of Kentucky by &c. is plaintiff and John B. Thompson is defendant, as appears from the record and files of the Franklin Circuit Court.

Witness my hand as Clerk of the Court aforesaid, this 9th day of May, 1905.

BEN MARSHALL,
*Clerk Franklin Circuit Court.*

Clerk's fee for transcript, $13.80.

65 With said transcript the appellant filed a statement and which is in words and figures as follows—

*Statement.*

John B. Thompson is the sole appellant.

The Commonwealth of Kentucky which sues by T. C. Albritton Revenue Agent is the appellee.

The judgment appealed from was rendered at the April term, 1905 of the Franklin Circuit Court and on April 20th, 1905, and may be found on pages 33 and 34 of this transcript.

The appeal was granted by the Court below and no summons is necessary. J. B. THOMPSON, *Appellant.*

66 Be it remembered that on the 20th day of September 1905 at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to wit:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

Came parties by counsel and filed an agreement, and on motion, this case is ordered docketed for the present September term.

The agreement mentioned in the foregoing order is as follows:—

Kentucky Court of Appeals.

J. B. THOMPSON, Appellant,
*vs.*
THE COMMONWEALTH OF KENTUCKY, by, &c., Appellees.

*Agreement.*

It is agreed between the parties hereto, appellant and appellee that this cause may at once be docketed for the present term of this Court.

Sept. 26, 1905. J. B. THOMPSON,
By J. W. LINDSEY,
JNO. W. RAY,
*For Appellee.*

67 And afterward on the 21st day of November 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered to wit:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

This case is ordered to be submitted with 15 days' leave to parties to file briefs.

And afterwards on the 28th day of November 1905 at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to wit:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

Came parties by counsel, and on motion the order of submission herein is set aside, and filed grounds, and moved the Court to pass said case for oral argument, which motion is submitted.

(The grounds of appellant for setting aside order of submission referred to above is as follows:)

68 Court of Appeals, State of Kentucky.

J. B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, Appellee.

The appellant, J. B. Thompson, comes and moves the court to set aside the order entered herein, submitting the above styled case for decision reserving the right for him to file brief therein within fifteen days from date of said order, because the same was entered without notice to him and because he has been sick and afflicted to such an extent since in September that he has been incapacitated by reason of this infirmity from attending to any business whatever of this kind; that for the last two weeks he has been under the care of Dr. I. N. Bloom, a specialist, and has been confined in the Jewish Hospital in the City of Louisville and is now therein confined; that the entering of this motion by Mr. Ray, the opposing counsel, is a surprise to him, as he understood that it was agreed that this
69 case was to be held up until the physical condition of the appellant was improved to such an extent that he would be able to attend to the business, and that the appellant is himself a lawyer by profession and had no other counsel employed to represent him in this case.

70 And with the said grounds the following affidavits were filed, and which are in words and figures as follows:

Court of Appeals, State of Kentucky.

J. B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, Appellee.

The affiant, J. B. Thompson, says that he is the appellant in the above styled case pending in this court; that he is sick and badly afflicted with a disease known to the doctors as eczema, and has been so afflicted since about the middle of September, to such an extent that he has been prevented from preparing his brief in the present case, and from attending to any business of a similar nature; that he is now, and has been for the last two weeks, confined in the Jewish Hospital at Louisville, Ky., under the immediate care of Dr. I. N. Bloom, a specialist in skin diseases, and that he will perhaps have to remain in the hospital from two to three weeks
71 longer while he is being treated; that the character of the disease, as well as the character of the treatment resorted to, renders it impossible for the affiant to leave the hospital for any purpose or to prepare any paper whatever connected with this case or any other; that, under the doctor's instructions, he is not allowed to put on his clothes, and the character of the treatment is such, being the application of ointments and salves, that if the doctor were willing, the affiant does not believe he would be able to endure his clothes. That the horrible burning and itching sensation incident to the disease renders anything like intellectual labor wellnigh an impossibility, nor does the affiant see how, without access to books, papers and records, he could possibly prepare an argument or brief that would be acceptable to the court upon a question of such vast importance as that pending in this case; that if he had the papers and books with him, inasmuch as he is bound up, hand and foot, in ointments and salves, it would be impossible for him to handle any of the said papers, books, etc.

Appellant says further that it was thoroughly understood
72 between himself and Mr. Ray, the opposing counsel, that this case was to be held in abeyance awaiting the development of the appellant's condition, and, if possible, to be submitted not later than the first of January when argument could be had. But if Mr. Ray did not so understand it, the appellant did, and he came to the hospital within an hour after his conversation with the counsel of the appellee, and has been strictly confined in the hospital ever since. He asks, therefore, that the order entered herein may be set aside, not for the purpose of delay, but that he may have a fair and impartial hearing of the case. J. B. THOMPSON.

Subscribed and sworn to before me, Zella M. Hulse, Notary Public in and for Jefferson County, State of Kentucky, by J. B. Thompson, this twenty-fourth day of November, 1905.

ZELLA M. HULSE,
*Notary Public.*

My commission expires Feb. 9, 1908.

73 Court of Appeals, State of Kentucky.

J. B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, Appellee.

The affiant, Dr. I. N. Bloom, says that he is a practicing physician in the City of Louisville and is a specialist in skin diseases, and as such, has had charge of the appellant, J. B. Thompson, who is now confined in the Jewish Hospital in the City of Louisville and has been so confined since November 11th, for treatment for eczema, a skin disease; that he has not only restrained the affiant from going out of the hospital for any purpose, but knows that it has been impossible for him to go out and attend to any business whatever, considering the nature of the treatment, and that he has strictly forbidden him to even put on his ordinary clothing.

I. N. BLOOM, M. D.

74 Subscribed and sworn to before me, Zella M. Hulse, Notary Public in and for the County of Jefferson, State of Kentucky, by Dr. I. N. Bloom, this 24th day of November, 1905.

ZELLA M. HULSE,
*Notary Public.*

My commission expires Feb. 9, 1908.

75 And afterwards on the 29th day of November A. D. 1906 at a Court of Appeals held at the Capitol at Frankfort the following order was entered:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

The court being sufficiently advised appellants motion for an oral argument is sustained, and said case is continued for oral argument to the January term.

And afterwards on the 29th day of January, 1906, at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered to wit:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

Came appellee by counsel and moved the Court to dismiss the appeal herein, and said case coming on to be heard was argued by

John B. Thompson for the appellant and John W. Ray for the appellee, and submitted on the motion and merits.

(The motion of appellant to dismiss is in words and figures as follows:)

76 Court of Appeals.

JNO. B. THOMPSON, Appellant,
*v.*
THE COMMONWEALTH OF KY., by, &c., Appellee.

*Motion to Dismiss Appeal.*

The appellee moves to dismiss this appeal for want of jurisdiction, because the amount of the judgment appealed from, which was for money, is less than two hundred dollars, Exclusive of Interest and costs.

JOHN W. RAY,
*For Appellee.*

77 And afterwards on the 13th day of June A. D. 1906 at a Court of Appeals held at the Capitol at Frankfort the following judgment was entered, to wit:

JOHN B. THOMPSON, Appellant,
*v.*
COMMONWEALTH OF KY., by T. C. ALBRITTON, Revenue Agent, Appellee.

Appeal from Franklin Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellee recover of appellant ten per cent. damages on amount of the judgment superseded herein which is ordered certified to said Court,

It is further considered that the appellee recover of the appellant his costs herein expended.

And on said date the court delivered the following opinion:

78 Court of Appeals of Kentucky.

June 13, 1906.

(To be Reported.)

JOHN B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, &c., Appellees.

Appeal from Franklin Circuit Court.

*Opinion of the Court by Judge O'Rear.*

The sole question presented on this appeal is whether the statutes of this State imposing a tax on distilled spirits in bonded warehouses violate the federal Constitution, and particularly the Fourteenth Amendment thereof. The question as to whether the statutes are valid under the Constitution of this State has been thoroughly considered by this Court in numerous cases, and in every instance decided in favor of their constitutionality. (See Commonwealth *v.* E. H. Taylor, Jr., Co. 101 Ky., 325; Commonwealth *v.*
79 Walker, 25 R., 2122; Commonwealth *v.* Rosenfield Bros. 25 R., 2229.) It is not necessary to restate the proposition disposed of by these opinions.

Appellant in his brief filed on this appeal says:—

"It is not necessary on this appeal that the Court shall either overrule, modify or change in any manner its opinion rendered in the case of the Commonwealth against Rosenfield. In accordance with the previous opinion of the Court in the case of the Commonwealth against E. H. Taylor, Jr., (101 Ky. p. 325), it was held in the Rosenfield case that the law which imposed the tax and interest—the matter in controversy in this action—is not in conflict with the Constitution of the State of Kentucky. It has never been held that this law is not in conflict with the Constitution and laws of the United States and this is the question we now present."

It is the contention of appellant that whiskey contained in the government warehouses before the payment of the taxes
80 thereon due the United States Government, is not property within the jurisdiction of the State; that it is in the hands of the federal government and its officers, not subject to the control or dominion of the warehousemen, and that if he is compelled to pay this tax he is denied the equal protection of the law, his property is taken without due process of law, and for public purposes without just compensation. Taxes levied by the State are imposed upon property and against the owner of the property primarily. It is not argued and cannot be supposed that the federal government owns the whiskey in question. It does not. Nor is it the bailee of the whiskey. It has a superior lien upon it to secure the payment of the internal revenue tax due to the United States government. But further than that the federal government does not claim an interest

in or a lien upon the whiskey. Consequently the title to it is in the owner of it, whoever he may be, subject to the lien of the federal government for its taxes. It is undoubtedly property; it is
81 situated within the State; it receives the benefit of protection from the State laws; it ought to pay, and by the express provision of the Constitution it, in common with all other property in the State, is required to pay taxes, to be made to bear its equal share of the public burden.

The imposition of a tax upon property is not taking the property. The assessment of it and its subsequent distraint for taxes in arrears is not a taking of property without due process of law, if the owner or person charged with the payment of the taxes has had (as he confessedly has had in the case at bar) notice of the assessment and the amount due.

We are unable to see where, in being compelled to pay taxes upon his property, the owner of distilled spirits or the warehouseman is denied the equal protection of the law. As a matter of fact everybody else in the State owning property in the State, and all other property situated in the State is required to pay taxes at the same rate that distillers and warehousemen are. No discrimination
82 whatever is to be found in the tax statutes of this State against distillers or warehousemen of distilled spirits in favor of any other taxpayer or class of taxpayers.

Great stress is made in the argument upon the fact that there is an attempt on the part of the State to impose and collect a tax upon property in custody of the federal government, that this would lead to a conflict of jurisdictions, and as such is an interference with the sovereignty of the federal government.

In the first place, there is no such conflict, for the State does not propose to collect the taxes so long as the spirits are in the custody or under the lien of the federal government. In the next place, if there was such conflict it would be a question between the State and the federal government, and not one that the taxpayer could take advantage of.

In Carstairs *v.* Cochran, 193 U. S. 10, the question of the power of the State to impose a tax upon distilled spirits in bond, but to be collected after the government lien was satisfied, was before the Supreme Court. In the course of the opinion of the Court,
83 delivered by Justice Brewer, it was said:—

"Under federal legislation distilled spirits may be left in a warehouse for several years, and that there is no specific provision in the statutes in question giving to the proprietor who pays the taxes a right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been issued, do not affect the question of the power of the State. The State is under no obligation to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein, but it is their business if they wish further protection than the lien given by the statute to make their contracts accordingly."

This question was recently before the United States Circuit Court

for the Eastern District of Kentucky. It came up in the case of Anderson County *v.* Kentucky Distillers & Warehouse Co. That Court, by Judge Cochran, District Judge, in an opinion filed
84 February 28th, 1906, held that the State taxes were collectible from the warehousemen according to the terms of our statutes.

Such was the ruling of the circuit court in the case at bar, and the judgment is *affirmed with damages.*

J. B. Thompson, for Appellant.

John W. Ray, for Appellees.

85 Be it remembered that on the 20th day of June 1906, there was filed in the office of the Clerk of the Court of Appeals, the following order to wit:

Kentucky Court of Appeals.

Wednesday June 20th, 1906.

J. B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, Appellee.

*Order.*

On motion of appellant the time is extended to September 1st, 1906, for filing a petition for a rehearing in this case.

W. E. SETTLE,
*Judge Ky. Court of Appeals.*

86 Be it remembered that on the 17th day of September 1906 at a Court of Appeals held at the Capitol at Frankfort the following order was entered to wit:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

Came appellant by counsel and on motion is given until September 20th to file a petition for rehearing.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 19th day of September 1906 the following order was entered to wit:

THOMPSON
*v.*
COMMONWEALTH, by, etc.

Franklin.

Came the appellant by counsel and filed a petition and moved the Court to grant a rehearing, which motion is submitted.

(The petition referred to in the foregoing order is as follows:)

87 Kentucky Court of Appeals.

J. B. THOMPSON, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, Appellee.

*Petition for Rehearing.*

We ask a rehearing and review of this case because the opinion is not sound, is irreconcilable with other adjudicated cases, is in conflict with the Constitution and laws of the United States and is not responsive to the questions submitted and which are necessary and proper to be answered if it is to stand the test of criticism and be clearly understood and properly applied as a precedent. The case must eventually be taken, whatever may be the opinion of this Court, to the Supreme Court of the United States for final adjudication upon the Federal questions involved. It is, therefore,
88 important for either party taking such an appeal, that the questions at issue should be fully, frankly and fairly stated and answered without any evasion whatsoever.

The court in the case at bar cites, and seems to rely upon, the case of Carstairs against Cochran (193 U. S. p. 10) as conclusion of the question of the power of the State to impose a tax upon distilled spirits in a United States Government distillery bonded warehouse before the Government tax is paid. The case of Carstairs against Cochran relies upon, and cites as authority, the case of the Commonwealth of Kentucky against E. H. Taylor, Jr. & Co. (101st Ky. p. 325). In this way, this case stands on the Carstairs case, the Carstairs case stands on the Taylor case and the Taylor case stands on nothing; not even upon the first opinion of this court in the Taylor case which was withdrawn, and for which the present opinion cited as authority was substituted. The court in its opinion herein says:

"It is not argued and can not be supposed that the Federal
89 Government owns the whiskey in question; it does not, nor is it the bailee of the whiskey."

Then, as far as the settlement of this case is concerned, this had just as well been left out of the opinion because it tends only to confuse.

The court further says, following this; "It (The United — Government) has a superior lien upon it (the whiskey) to secure the payment of the internal revenue tax due to the United States Government, but further than that the Federal Government does not claim an interest in or lien upon the whiskey. Consequently, the title to it is in the owner of it, whoever he may be, subject to the lien of the Federal Government for its taxes."

We can go further than the opinion does upon this matter. The Government not only has a superior lien, but it has an exclusive

lien, for its superior lien excludes all other claims until it is satisfied by payment.

The statement of the facts in this connection, made by the court, is but a partial statement, the controlling facts being, as it
90 seems, overlooked or purposely left out by the court, the addition of which facts changes entirely the face and complexion of the case. It is misleading therefore to say that "further than that (a superior lien) the Federal Government does not claim an interest in or lien upon the whisky." This is misleading because it is not true in fact. If the statements of the facts by this court in the case of the Commonwealth *v.* Taylor (101st Ky. p. 325) are correct, the Federal Government does claim an interest in the property beyond that stated by the court in the case at bar. It not only claims the right to hold, but it actually has the absolute possession, exclusive custody and control of the property. The Government is not satisfied to claim a mere superior lien upon the whiskey, in the language of the court, and its absolute rights and superior claim are stated and admitted in the Taylor case in which this court says: "These barrels are deposited by them (Government officers) in bonded warehouses which are absolutely under the control and in the possession of the United States revenue officers and the actual possession of these packages is held and retained by the Government for the payment of the tax thereon." (Page 330.) And on
91 page 331, the court further says: "Its right (The Government's) to the possession of the property is supreme." Hence, it follows that the lien of the Government is not a mere lien claim asserted against the property, executory in character, but is a lien claim that has been executed by the Government by taking the property upon which the lien is claimed into its possession, and it is this absolute possession, exclusive custody and control that marks the distinguishing features in this case and are the controlling factor thereof. It is therefore but a partial statement and a misleading statement for the court, from the facts stated by it, to say "consequently the title to it is in the owner of the whiskey, whoever he may be, subject to the lien of the Federal Government for its taxes." The court knows that the statute under which this tax is sought to be collected, is not one directed at the owner of the whiskey. The owner of the whiskey is not, under the statute, assessed for the tax. The tax is assessed against the warehousemen who, it is as-
92 sumed, is in custody of the property, although the property is admittedly in the custody of the Federal Government.

The court further says in its opinion: "It is the contention of the appellant that whiskey contained in a Government warehouse before the payment of the tax thereon due the United States Government is not property within the jurisdiction of the State; that it is in the hands of the Federal Government and its officers, not subject to the control of the warehouseman and that if he is compelled to pay this tax he is denied the equal protection of the law and his property is taken without due process of law for public purposes without just compensation."

The court seems to answer this as follows:

"It is undoubtedly property; it is situated within the State; it receives the benefit of protection from the State law; it ought to pay, and by the express provisions of the Constitution, it, in common with all other property in the State, is required to pay taxes
93 and to be made to bear an equal share of the public burden."

The first statement of the court that it is undoubtedly property can not be successfully controverted. The second statement of the court that "it (the property) is situated within the State," can not be successfully maintained. Section 420 of the State Statutes provides: "All real and personal estate within the State * * * shall be subject to taxation." That whiskey in a United States Government bonded warehouse, held by the Government and its officers for taxes, is not property within the jurisdiction of the State, or is not real and personal estate within the State, we propose to prove by the principles laid down and established by all the adjudicated cases of other courts and by the decisions of this court, not merely beyond a reasonable doubt, but to demonstrate it to a mathematical certainty. The process by which this is done, although Justice may sit with bandaged eyes, are so plain, so certain and yet so obvious, that one by lengthened argument feels
94 that if he is not in fact abusing a privilege he is at least imposing upon the patience of the court. We propose to show that the term "situated within the State" used by the court, as used is not clear, specific or definite, nor a sufficient answer to the questions submitted. No one denies that the whiskey in a bonded warehouse is "situated within the State" if to be "situated within the State" means nothing more than that it has a physical existence within the geographical boundaries and territorial limits of the State. But if the term "situated within the State" used by the court, means more, then we deny the accuracy of the statement. We assert that the fact of the actual physical existence of the real or personal estate within the geographical boundaries or territorial limits of the State, notwithstanding the term used "within the State," does not include, nor was it intended to include, without exception, for taxation by the State, all real and personal estate within the geographical or territorial limits of the State.

We further assert that such fact—the existence of real
95 or personal estate within the geographical boundaries and territorial limits of the state—is not the controlling or determining factor in the case at bar. While this fact—the actual physical existence of real and personal estate within the geographical boundaries or territorial limits of the State—must exist before the State can tax, the State can not, on this account alone, subject such property to taxation. Therefore, it is not only inaccurate but erroneous for the court to say that this property is subject to taxation because it has an actual physical existence within the geographical boundaries or territorial limits of the State, in utter disregard of the further fact that it is not subject to the jurisdiction of the State, to the dominion of the State or to the laws of the State, and the processes of the State for the enforcement of the laws. If

the court means by the term "situated within the State" more than the actual physical existence of the property within the geographical boundaries and territorial limits of the State, then the court
96 should have explicitly so stated and what it did mean by the use of this term. If being "situated within the State" is a sufficient reason or fact to uphold the right of the State to tax the property in the acse at bar, it must be a sufficient reason or fact in all cases. If it is not sufficient in all cases then it is, of itself alone, not a sufficient reason or fact in the case at bar, because it noes not have the same conclusion and binding force in all cases alike and therefore depends in some cases on some other reasons or conditions attached or detached, connected or dis-onnected with it to determine its force and effect. If its force and effect is therefore controlled or determined in any case by other facts, reasons or conditions it becomes necessary to examine separately each case to which it is to be applied in order to ascertain whether such other facts or reasons, and not "situated within the State" are, or not, the controlling and determining facts or reasons in such case. We declare, without fear of contradiction, that property situated within the State, within the meaning of the term used by the court, must
97 be, not only situated within the geographical boundaries and territorial limits of the State, but must be so situated and in such condition that it constitutes a part and parcel of the great general mass of property within the State by which it is surrounded and being a part and parcel of this great general mass of property is affected equally and uniformly by all laws passed relative to this mass of property of which it constitutes a part. If a law is passed to tax this great general mass of property equally and uniformly the property, to be included within the scope of the law, must be within the jurisdiction and subject to the dominion of the State; otherwise, it is not affected by such law whether statutory or constitutional. If it is not within the jurisdiction and subject to the dominion of the State it is not and can not be made the subject matter of taxation by the State. If it does not constitute a part and parcel of the great general mass of property, but stands outside of all things by which it is surrounded by a separate physical existence "within the State" it is not subject to the jurisdiction or dominion of the State, nor a subject matter of taxation by the State.

98 What property can we cite that has an actual physical existence within the geographical boundaries and territorial limits of the State to show conclusively that "all real and personal estate situated within the State" is not subject matter for taxation by the State for this reason alone?

First. The property of consuls, ambassadors and the representatives of foreign governments situated within the State is not within the jurisdiction of the State nor subject to the dominion of the State, nor taxable by the State. (Coe *v.* Errol, 116th U. S. p. 717.)

Second. Post offices, custom houses, and in fact, any property belonging to or in the use of the Government of the United States, situated within the State is not within the jurisdiction nor subject

to the dominion of the State and is not taxable by the State. (Cooley, Vol. 1, p. 129. Coe *v.* Errol, *supra.*)

Third. Indian lands or personal property held by the Federal Government in trust for the benefit of the Indians, situated within the State are not subject matter for taxation by the State.
99 (New York *vs.* Indian Land, 5th Wallace, p. 761; also Moore *v.* Showalter, 2d. Wyo. Ter., p. 8; Auditor General *v.* Williams, 94th Michigan, p. 180; Moore *v.* Besom, 7th Wyo., p. 292, and Gray *v.* Thomas, 5th Oklahoma, p. 1; also Wagner *v.* Evans, 170 U. S., p. 588.)

In a very recent opinion in the case of the United States against James A. Reckert (Vol. 188, U. S. Reports, p. 438-439) the Supreme Court says: "To say that these lands may be assessed and taxes by the County of Roberts, under the authority of the State, is to say that they may be sold for taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes from year to year and thereby keeping the land free of incumbrance."

Fourth. Army and navy equipments, supplies and appurtenances, soldiers' homes, hospital, quarantine stations, medical supplies, etc. In fact, any and all property belonging to the Federal Government or held for its use for any purpose connected with the performance of its functions, may be situated within the State, but are not,
100 on account of this fact, subject to the jurisdiction and dominion of the State, and a subject matter of taxation by the State.

Fifth. Articles of merchandise stored in a custom house of the Federal Government, although "situated within the State," are not subject matter of taxation by the State. It has been expressly held in regard to this class of property in an unbroken line of decisions, that articles imported from foreign countries are not subject matter of taxation by the State and such articles and the duties paid thereon do not lose their character as imports so as to become a subject matter of taxation by the State as a part of the mass of property situated within the State until they have passed from the control of the importer, or been broken up by him from the original cases; and the State tax is void, whether imposed upon them distinctly as imports, or as constituting a part of the importer's property. (Low *v.* Austin, 3d Wallace (U. S.), 29; Brown *v.* Maryland, 2d Whet., (U. S.), 419; License cases, 5th Howard (U. S.), 575;
101 Cook *v.* Pennsylvania, (U. S.) 97, p. 566; People *v.* National Ins. Co., 27 Hun. (N. Y.) 188; Blount *v.* Monroe Co., Ga., 61.)

Sixth. Property in transit through the State or held for exportation at some entry port, although "situated within the State," does not constitute a part and parcel of the general mass of property in the State, is not subject to the jurisdiction or dominion of the State and is not a subject matter of taxation by the State. (Coe *v.* Errol, 166 U. S., 717.)

In each of the six cases above mentioned, in the language of the Court used in the case at bar, the property is "situated within the State"; that is, it has an actual physical existence within the geo-

graphical boundaries and territorial limits of the State, but, by the principles settled and determined in the cases cited and all other adjudicated cases, "situated within the State" does not, of itself alone, make the property a subject matter of taxation by the State in which it is situated.

102 Again, the property in the case at bar is held by and in the possession of the Federal Government; so is the property in most of the above cited cases where it is declared to be exempt from taxation by the State and this exemption, from the principles laid down in these cases, seems to cover any and all properly held by the Federal Government in its possession or control for any purpose. We, therefore, with perfect candor, ask the court to cite us to a single instance mentioned in any case where any State has ever taxed any property held by the Federal Government in its possession, custody and control for any purpose, and such tax been sustained by any court, except in the case at bar.

It has been repeatedly held that no State can impose taxation on persons, property or other subject matter of taxation which are not within its jurisdiction. (Cooley, Vol. 1, p. 129), nor upon property over which it has no dominion. (Peoples *vs.* McCreary, 34 Cal., 432-456), and in the foreign held bond case (15

103 Wall., 300-319) it is said by the Supreme Court, "no adjudication should be necessary to establish so obvious a proposition as that properly lying beyond the jurisdiction of the State is not a subject matter upon which its taxing power can be legitimately exercised." And again, in referring to and quoting from the Louisville, etc. Ferry Co. *vs.* Kentucky (180 U. S. 385-393), "while the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have a relation to a subject matter within the jurisdiction of the taxing power. See also McCullough *vs.* Maryland 14 Wheat. 316-429; Hays *vs.* Pacific Mail S. S. Co. (17 How. 596-599); St. Louis *vs.* Ferry Co., (11 Wall., 423, 429, 431). Morgan *vs.* Parham (16 Wall. 471-476).

It does not seem that we should be compelled to go beyond the recent case of the Union Refrigerator Transit Co. *vs.* Commonwealth of Kentucky (Opinion, Case No. 84, October term, 1905).

In this case it is said: "It is also essential to the validity of a

104 tax that the property shall be within the territorial jurisdiction of the taxing power." These cases clearly establish these principles that the subject matter of taxation, whatever it is, must be within the territorial jurisdiction of the taxing power and that no State can impose taxes upon property or subject matter which is not within its jurisdiction, or upon property over which it has no dominion. These terms, "property lying beyond the jurisdiction of the taxing power," "property not within the jurisdiction of the taxing power," "property over which it has no dominion," "property within the territorial jurisdiction of the taxing power," "property within the jurisdiction of the taxing power," "property subject to the dominion of the taxing power," used by the courts all

mean but one and the same thing. Do the terms "beyond and within the jurisdiction of the taxing power" refer alone to the geographical boundaries and territorial limits of the taxing power, or do they refer also to the limits and boundaries of its sovereign
105 power—the point at which its laws and its processes for the enforcement of its laws ceases to have vital force in the hands of its officers? Is, or not, property, in fact as well as in effect, as much beyond the jurisdiction of the State if as said in the Taylor case "it is not liable to any of the processes of the State," and "there is no power in the State to subject it to the demands of the State" as if the property was physically beyond the jurisdiction by reason of being outside of the geographical boundaries and territorial limits of the State? We thus find the term "within or beyond the jurisdiction of the State" used by the court, is a conclusive fact in determining the power of the State. What difference then does it make to the State which state of facts limits, determines or arrests its powers" Is, or not, the consequence the same both to the State and the Individual? If the property is beyond the jurisdiction of the State because its physical existence is located outside of its geographical boundaries and territorial limits and the prop-
106 erty is by reason of this fact not subject to its jurisdiction, its dominion or its laws, is not the property also beyond its jurisdiction if, for any other reason or cause, it is outside of the operation and force of its laws, and do not these expressions or terms used by the courts include both? We claim that they do and that they mean that property, to be a subject matter of taxation by the State, must be within its jurisdiction, subject to its dominion and constitute a part and parcel of the great general mass of property within the State, subject to its laws and, at all times, subject to the processes of the State for the enforcement of its laws.

Property can not be said to be within the jurisdiction of a State and subject to the dominion of the State, that is not subject, at all times, to the laws of the State, nor can it be said that it is subject to the laws of the State if it is not subject at any and all times, to its processes for the enforcement of those laws. The vital point is not whether the situs of the property is within the geographi-
107 cal boundaries and territorial limits of the State, but whether it is within reach of its legal processes for the enforcement of its laws. The property sought to be taxed may be situated within the geographical boundaries and territorial limits of the sovereignty laying the tax, but may not be subject to its laws or to its legal processes for the enforcement of its laws; hence, it is outside of and beyond its territorial jurisdiction and property over which it has no dominion. It is a question, therefore, not of geographical limits, but of dominion and jurisdiction, and it is beyond the jurisdiction of the Sovereign State when it can not be reached by any of its processes and is not subject to its demands or to its laws.

The property sought to be taxed may have an actual physical existence within the geographical boundaries and territorial limits of the State and yet not be "situated within the State" if "situated" means that it constitutes a part and parcel of the general mass of

property within the State and is subject to the jurisdiction and
108 dominion of the State, its laws and its processes for the enforcement of its laws. If, therefore, the property in fact has such an actual physical existence within the geographical boundaries and territorial limits of the State, in order to ascertain whether it is "situated within the State" within the meaning of the judgment and opinion of the court in the case at bar and whether it is subject to the jurisdiction and dominion of the State, its laws and its processes for the enforcement of its laws, we must apply the supreme test by placing in the hands of or delivering to the proper officers of the State writs or processes directing and empowering them to assess, seize, hold and sell the property for the taxes of the State or any other claims or demands that the State may have against it. If the claimed right by the State to tax does not stand this test—the supreme and only test that can be applied to determine sovereign power, jurisdiction and dominion—the property is not subject matter within the jurisdiction of the taxing power within the principles as well as within the language of all the adjudicated cases.
109 This, the supreme test, has been applied in many States and, in all the reported cases, upon principles well established, it has been declared (whiskey in United States Government distillery bonded warehouses) is in the possession, custody and control of the Federal Government and its officers; that its power over it is supreme; that this possession by the Government is held for the collection of its taxes and that this possession can not be disturbed (Harris *vs.* Denny, 3rd Peters, 292). In the case of Clark *vs.* Peaslee (Case 2830 Vol. 5, Federal Cases, p. 903) it is held that whiskey stored in a distillery bonded warehouse and goods and merchandise stored in a custom warehouse occupy the same relation to the Government and to the State; that there is practically no difference between the two, as, in both cases, the property is in the possession, custody and control of the Government for the purpose of collecting the tax due the Government thereon. It would
110 thus seem to be settled by these cases that the Government has something more than a superior lien. In the case of Clifford (2nd Sawyer, 428, Case No. 2893, 5th Federal Cases, p. 1051) the Court says: "Goods in a United States bonded warehouse and on which the duties have not been paid, are in the possession of the United States." It would seem, from this case, that the Government has something more than a lien for its taxes. In the case of McCullough *v.* Large, 20th Federal Reporter, p. 311) the Court says: "We find no provision in any part of the internal revenue laws giving countenance to the idea that a sheriff has the right to enter a bonded warehouse of the United States and seize spirits, held therein for the Government tax." And referring and quoting from Harris *vs.* Denny, and quoting from Fisher *vs.* Daudestal (9th Federal Reporter, p. 145) the Court concludes: "The present case is not distinguishable in principle from those before cited. The
111 whiskey in question was virtually in the possession of the United States—held for internal revenue taxes—and the sheriff could not rightfully disturb that possession."

The two cases referred to above as authority are cases covering property in custom warehouses and the Court could make no distinction between goods held by the Government in a custom warehouse and goods held in a distillery bonded warehouse.

In this State the context of the law under which this tax is attempted to be assessed and collected, admits that the property is not within the jurisdiction of the State nor subject to its laws while in a United States distillery bonded warehouse in the possession of the Federal Government. It is useless for the Court to refer to the owner of the whiskey in attempting to uphold the tax. The owner of the whiskey is not mentioned in the statute imposing the tax. If the tax was laid upon the owner alone for property of his within and not beyond the jurisdiction of the State there might be some force, some justice and some equity in the reasoning of the Court, but as the tax is not laid upon the owner for property held by him
112 or by others for him within the jurisdiction of the State but upon a person, who, by the decisions of this court, is erroneously declared to be the custodian of that which is held by the Government in its possession, it seems a mere act of extortion on the part of the State to compel him to pay taxes upon the property of another that is not in his possession nor subject to his control. That this property is not in his possession nor subject to his control is declared in this State by the Court in the case of the Commonwealth *vs.* Taylor (101st Ky.) when it says: (p. 330) "These barrels are deposited by them (Government officers) in bonded warehouses which are absolutely under the control and in the possession of the United States revenue officers and the actual possession of these packages is held and retained by the Government for the tax thereon."

Neither the distiller (the warehouseman, who is sought to be charged with the payment of the tax) nor any one else is per-
113 mitted to enter these warehouses except in the presence of the Federal officers and then only for the purpose of repairing the packages or removing them after the tax due the United States has been discharged.

Again, on P. 331, the Court says: "While the whiskey is in the bonded warehouse, in the custody of the United States Government, its right to the possession of the property is supreme. It is not liable to any of the processes of the State Courts. It can not be reached by judgment, distress warrant, or execution." (Drake on Judgment, 6th edition, sec. 281 and Taylor *v.* Carryl, 24 Pennsylvania, 257), and there is no power in the State to subject it either to the demands of the State or to the claims of creditors until the lien of the Government for its taxes has been fully discharged and the possession of the property surrendered to the owner. And to make the matter absolute and more emphatic, the Court said, after reciting these circumstances: "The law authorizes the payment of the tax due the United States Government at any time after it is entered into the bonded warehouse until the end of the bonded period, which is eight
114 years, and owing to the manner in which the title of the property is transferred and the uncertainty of the time when the

lien of the Government will be discharged and its possession surrendered to its owner, it is almost impossible for the State officials to know when any particular package will be surrendered to its owner and be liable to process in their hands as it would require a constant guard at each distillery warehouse in order to be informed when each separate package came out of bond so that the tax might be collected thereon. Under these circumstances the legislature made the distillers the agents of the State to collect from the owner of the whiskey the tax."

We therefore find, both by the context of the statute and the opinion of the court in the case cited, that the whiskey is not within the jurisdiction of the State, is not subject to the dominion of the State, is not subject to its laws, nor within the reach of its processes for the enforcement of its laws until the possession has been surrendered by the Government to the owner.

115 If this is not true, why did the State postpone the payment of its claim for taxes for eight years, or until the Government tax is paid and the whiskey passes from the possession and control of the Government to the owner and is put by him into the channels of commerce, thereby becoming a part and parcel of the general mass of property within the State? If this property does not belong to a jurisdiction other than that of the State and is not beyond its jurisdiction and dominion, why does not the State proceed at once to collect this tax, if not paid, by seizing and selling the property as it does in all other cases of delinquent taxes? Why should it postpone its taxes in this case and thus distinguish from all others? The Court lays very great stress upon the fact that this property is to be taxed only ad valorem as other property is taxed and that that constitutes both equality and uniformity within the constitutional limitations. The fact that the tax attempted to be laid is

116 equal and uniform on his property with other personal property, if true, does not determine the matter and has no bearing whatever upon the question submitted. If the State has no dominion or power over the property, such facts do not give it power or dominion. If the property is beyond its jurisdiction, the equality and uniformity of the tax does not bring the property within its jurisdiction or dominion. If the property is in the possession of the Federal Government and held by it for taxes and therefore belongs to another sovereignty and jurisdictions, these facts and this State statute can not take it from this sovereign power and transfer it to the sovereign power and jurisdiction of the State. The State can not, by the adjustment of its revenue laws, retard, hinder, impede or obstruct the Federal Government in the legitimate exercise of its powers or the proper performance of its functions. "But" says the Court, in the case at bar, "The State does not attempt to collect its tax until after the tax of the Federal Government has

117 been paid and therefore there is no conflict between the two sovereignties, the Federal and the State" and if there was, suggests that this controversy is between the Federal Government and the State Government and not one that the individual who discharges the payment of the tax can take any advantage of. We had

thought that in all cases where a person was being subjected to the power of two sovereignties, that he had the right to ask and demand to know to which he owed his first allegiance. If the Federal Government can take the property for its taxes first, then the citizen charged with the payment of the State tax, which is inferior to the Government tax, certainly has the right to make the point and have it determined whether the property belongs to the Federal jurisdiction or to the State jurisdiction, because it can not belong to both, and if he can not raise the question where the State is proceeding against him, as in this case, when can he protect himself against the illegal extortions of the State? The fact that the State post-
118 pones the collection of its tax, or its attempted tax, until after the property has been freed from the jurisdiction and dominion of the Federal Government is an admission of the whole case for which we are contending.

If this property is in fact in the custody and control of the Government, its position is clearly defined from that of other property in the State upon which the State assesses taxes, or taxes against individuals on account of it. All other classes of taxed property are within the jurisdiction and subject to the dominion of the State. This property is not. The State, in order to reach this property for taxation as provided in the statute under which this controversy has arisen, must assess it while in the hands of the Government and such an assessment is the beginning of an action on the part of the State for the purpose of reaching the property to subject it to the payment of the taxes so assessed. No particular form or mode of procedure is necessary or required for this purpose. In fact, it has been held that the enactment of the statute is of
119 itself a process or proceeding against the property and may, when no other mode is prescribed, operate as an assessment of the tax. (Harris *vs.* Wood, 6 T. B. Mon. p. 641.) The action, therefore, in this case did not begin with the filing of the ancillary petition by the State for a judgment against the defendant in this suit on account of the property, but began when the State exerted, or attempted to exert, a power over it by subjecting it to the mode of assessment prescribed in the statute for its taxes levied against it, and this is true whether the proceeding be commenced against the defendant before the property is freed from the obligation of the Government tax or afterwards. The real controversy relates back to the date of the assessment of the tax against the appellant on account of the property, for it is then that his liability, if the State statute is to be enforced, becomes fixed and his liability against him can not be created or become fixed except the State can exert power over the property while in the hands of the Government and the controversy is not, therefore, between the individual and
120 the State, but practical-y between the State and the Government. The fact that the State has delayed its right to collect the tax, if it had such right, until after the property has been freed from the obligation to the Government for the tax, or upon its removal from the U. S. bonded warehouse, does not free the

question from the necessity of a construction of the revenue laws of the United States fixing the powers of the Federal Government over the property and limiting the powers of the State relative thereto.

The fact that the State proceeds from summary process in the mode of assessment, and not by suit, to reach this property, does not alter the case. The assessment is a summary process for the purpose of fixing liability upon the owner of the warehouse and the party supposed to be in the possession and custody of the property, which liability could have been much better determined had the State resorted to its right to institute suit for the purpose at the time of, or immediately after, the assessment, and not now, for the collection of the tax.

121 The assessment is among the first steps taken by the State to subject the property to the tax and to render the parties charged herein liable for the tax (Harris *vs.* Wood, 6 T. B. Mon. p. 641). The suit is the final step or culmination of the original process. The proceeding is a unit, though broken up into many bits, and each step constitutes but a part of the whole. The beginning of the proceeding, commencing with the assessment, being directed against the property held by the Federal Government in its possession for revenue purposes, is void and all subsequent proceedings are void, for the State can exert no power or control over it while so held, and if the State can exert no power or control over it, the State can not assess it, nor can it exert power over the individual on account of it. If the assessment, the attempted assessment, or the authorized assessment by the State is an exertion of power or authority by the State over this property in the hands of the Federal Government, a question of the construction

122 of the Federal laws, fixing and defining the rights of the Federal Government to this property against the State, arises at once, and requires a construction of these laws relative to this subject matter. If, on the other hand, it is declared that the State does not exert, nor seek to exert, by this assessment, power or authority over this property, then the claimed assessment, the basis of the State's right to tax, is void, for it must, under the statute, be fixed by an assessment, which is the effect of exercised power.

The question in this case is not whether the State has power to act on the property generally, by assessment involving eventually the Federal question as to the right of the State to tax at all, but of the right of the State to tax this property while it is in the hands of the Government and its officers held for taxes.

In this connection, however, the Court says in the case at bar: "The imposition of a tax upon property is not taking the property." The imposition of a tax upon property is taxation and "taxa-

123 tion is the act of laying the tax." "It is the process or means by which the taxing power is exercised." (Knowelton *v.* Supervisors, 9 Wis., 410-418; Harris *v.* Wood, 6 T. B. Mon. (Ky. p. 641.)

If these authorities are correct and if it is a process as stated by them the statement made in the case at bar by this Court is not tenable, namely, "The assessment of it and its subsequent distraint

for taxes in arrears is not a taking of property without due process of law, if the owner or person charged with the payment of the taxes has had (as he confessedly has had in the case at bar) notice of assessment and the amount due"—for if this proposition were the law and notice was all that was required to constitute due process of law, the constitutional guarantee to the citizen would be mere idleness, for the mere passage of an act is notice (Harris *v.* Wood, 6 T. B. Mon. 641). What does the phrase, "due process of law," or "law of the land" mean? It means more than a special act passed for the very purpose of authorizing the deprivation; if it had no broader meaning than processes prescribed by act of the
124 legislature, it would be the end of the case. Such a construction would be so narrow that it would render the constitutional guarantee mere nonsense, for it would then mean that no State shall deprive a person of life, liberty or property, or shall deny to any person within its jurisdiction the equal protection of the law or take his property for public purposes without just compensation unless the State shall choose to do so. It has been repeatedly and uniformly adjudicated that the terms "due process of law" and "law of the land" have a broad, comprehensive meaning and originated in the great bill of rights, the Magna Charta, and operate as a restriction in each branch of the civil government. Therefore, a State can not, by legislative enactment, deprive a person of his property without due process of law, nor through the medium of a constitutional convention so deprive him any more than it can through an act of the legislature. (Ziebold, 19 Re. Pr. (U. S. Cir.) 742; Clerk *v.* Mitchell, 69 Mo. 627.) The property of a private citizen can not be taken from him and given to
125 another citizen by the exercise of legislative power in any form. If the law under which the tax is levied is void, any property taken to satisfy it is taken without due process of law. (Beekman *v.* Railroad, 3rd S. Y. 73; Dundee Mortgage Co. *v.* School District, 19 Fed. Rep. 359.)

So, also in the recent case, to which I have before referred, of the Union Refrigerator Transit Co. *vs.* Kentucky, in which the Supreme Court says: "If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. (Railroad Co. *v.* Jackson, 7 Wall. 262; State Tax on
126 Foreign-held Bonds, 15 Wall. 300; Tappan *v.* Merchants' National Bank, 19 Wall. 490-499; Delaware, etc. R. R. Co. *v.* Pennsylvania, 198 U. S. 341, 358. In Chicago, etc. R. R. Co. *v.* Chicago (166 U. S. 226,) it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. See also Davidson

*v.* New Orleans, (96 U. S. 97, 102); Missouri Pacific R. R. *v.* Nebraska, (164 U. S. 403, 417); Mount Hope Cemetery *v.* Boston, (158 Mass. 509, 519)."

Whatever may have been the previous opinion of the Court upon this quesoitn, it is fully settled and determined now that it is not a question, as stated by the Court in its opinion in the case at bar, of notice, but a question of the validity of the tax itself and if the tax is void, no character of notice or procedure by which the citizen is to be deprived of his property amounts to due process of law within the meaning of the constitutional provisions for protecting the citizen.

127 The third proposition stated by the Court is that "It receives the benefit of protection from the State laws, it ought to pay, and by the express provisions of the constitution, it, in common with all other property in the State, is required to pay taxes and to be made to bear its equal share of the public burden."

The substance of the whole of this argument is that the property receives the benefit of protection from the State. That this is not sufficient to authorize the State to tax is shown in all of the cases we have cited; in the case of ambassadors and consuls, in the case of Indian lands and personal property held by the government, in the case of custom houses, post offices and other property of the government, in the case of merchandise imported and held in custom warehouses, in the case of property in transit, etc.; all of these receive the benefit of protection from the State in a modified and in a qualified way, but inasmuch as they belong and owe allegiance to another sovereign power and jurisdiction and are not part and parcel of the general mass of property in the State, they are

128 not subject matter of taxation by the State. In the Refrigerator Co. case, it is said: "The power of taxation, indispensible to the existence of all civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children."

Now this is practically the principle stated by the court, except that it is stated in greater detail, and yet the court, in that case, upon full consideration, said that "if the taxing power be in no position to render this service and such property be within the taxing power of another sovereignty to which it looks for protection, the taxation of such property by the State partakes rather of the

129 nature of an extortion than a tax and it has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law."

"It is essential to the validity of the tax that the property be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another sovereign power

receives none of the protection for which the tax is supposed to be a compensation." Therefore, it seems to us, that the principles announced that the property, although it receives in a modified way the benefit of the protection of the State laws, do not apply, and is therefore not, on this account, a subject matter of taxation by the State.

We propose now to take the opinion of the court in the case at bar and its statement that "it is undoubtedly property, it is
130 situated within the State, receives the benefit of protection from the State and it ought to be taxed," and apply it to merchandize held in a custom warehouse by the Government also for taxes and between which and the property in the case at bar, the courts have been unable to make a distinction and a difference. Is not the property in a custom house undoubtedly property? Is it not situated within the State? Doesn't it receive the benefit of protection from the State, and if whiskey in a government bonded warehouse is compelled to pay taxes on account of these facts, ought not the property in a custom warehouse likewise pay taxes? But what says the Supreme Court upon this question? It says: "Articles imported from foreign countries are not a subject matter of taxation by a state, and such articles and the duties paid thereon do not lose their character as imports so as to become the subject matter of State taxation as a part of the mass of property of the State until
131 they have passed from the control of the importer or been broken up by him from the original cases; and the State tax is void whether imposed upon them distinctly as imports or as constituting a part of the importer's property. (Low *v.* Austin, 3rd Wallace (U. S.) 29; Brown *v.* Maryland, 2nd Whet. (U. S.) 419; License cases, 5th Howard (U. S.), 575; Cook *v.* Pennsylvania, 97 (U. S.), 566; People *v.* National Ins. Co., 27 Hun. (N. Y.), 188; Blount *v.* Monroe Co., (Ga. 61)."

Why is it that the Court holds that this imported property is not a subject matter of taxation by the State, although it is situated within the State and receives the benefit of protection from the State until it has passed from the control of the importer or been broken up by him from the original cases? And why is it that the State can not impose upon it distinctly as imports or as constituting a part of the importer's property? It is to protect the Federal Government in the exercise of its sovereign power over property of this kind. If the State could tax the property before it becomes
132 a part of the general mass of property, it could destroy one of the chief sources of revenue of the Federal Government by prohibitive taxes imposed upon articles of commerce imported. And even after it becomes a part of the general mass of property, we doubt exceedingly whether the State then has power, by specific taxation, to retard or impede the consumption of property within the limits of the State and, by this indirect process, retard and impede the Federal Government in the collection of its taxes. If the property is taxed merely as all other property is taxed it may be possible that the power of the Federal Government would not extend to

the protection of the property against State taxes after it becomes a part and parcel of the general mass of property in the State, but it is certainly not taxable by the State while in the hands of the Federal Government, nor is it, do we believe, subject to special taxation which would destroy the efficiency of the laws of the Federal Government for the collection of its revenue even after it has
133 been released.

We are sorry that we must dissent from the statement of the Court in its opinion of the case at bar that the Supreme Court, in the case of Carstairs *vs.* Cochran, held that the State had power to impose a tax upon distilled spirits in bond, to be collected after the Government's lien was satisfied. The quotations given in the opinion of the Court of the case at bar in this case do not satisfy us, nor are they sufficient, inasmuch as the Court alludes only indirectly to the question submitted in the case at bar, which seems not to have been submitted for decision in that case as we present it in this. It merely holds in that case that where negotiable warehouse receipts have been issued which do not provide for the collection of interest upon taxes claimed to have been levied by the State upon the property, that the State was under no obligation to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein. We here present the naked question of whether the State has power
134 to levy and collect a tax upon whiskey stored in a United States Government distillery bonded warehouse and which is in the possession and control of the Government and its officers and held by it for taxes, and which we assert places the property beyond the jurisdiction and dominion of the State.

The Supreme Court says in the Carstairs case: "The State has undoubted power to tax private property having a situs within its territorial limits and may require the party in possession of the property to pay the tax thereon. Unless restrained by the provisions of the Federal Constitution, the power of the State as to the mode, form and extent of the taxation is unlimited when the subject to which it applies is within her jurisdiction. (State tax on foreign bonds, 15th Wallace, 300-319.)"

The Court here recognizes and makes clear a distinction between territorial limits and territorial jurisdiction, and qualifies territorial limits by territorial jurisdiction and limits these boundaries
135 by the extent of the jurisdiction of the sovereign State, and clearly says that the subject matter to which the law imposing the tax is intended to apply must be within the jurisdiction of the State as well as within its territorial limits and geographical boundaries.

This case, except it be understood and applied in this way, is wholly irreconcilable with all the other adjudicated cases upon the subject. If the construction contended for by the appellee should be given in this case, it would be in conflict with the recent opinion of the Supreme Court in the case of the Union Refrigerator Transit C. *v.* Kentucky, cited herein, and all cases referred to as authority it this case for the purpose of sustaining the same, for the Court

says: "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."

It would also be in conflict with the principles announced in the foreign-held bond case (15 Wall., 300-319) which is cited by the Court, and in which the court says:

136 "No adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

When is property lying beyond the jurisdiction of the State? Is it only when the situs is outside the boundaries of a State, or is it when, as said in all the adjudicated cases, it is beyond the jurisdiction of the State?

So also would it be in conflict with the principles announced in the case of Louisville Ferry Co. *v.* Kentucky, (188 U. S., 385-396) in which the Court says: "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principles inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to the subject matter with the jurisdiction of the taxing government."

If these principles are correct, three facts must exist; the
137 situs of the property must be within the geographical boundaries and territorial limits of the State; the property must also be within the jurisdiction of the State, and subject to its laws, and the person required to pay the tax must have possession of the thing taxed. These principles are not new and are practically the same announced in the case of Coe *v.* Errol, (116 U. S. 117). This was a case where Coe had logs cut in both the States of Maine and New Hampshire for transportation by floating them down the Androscoggin river and with an entrepot at the town of Errol where they were gathered together and remained for awhile awaiting further transportation. We quote the opinion of the Supreme Court in part of this case, because the statements are so applicable to the case at bar and the opinion contains the same principles quoted and relied upon in the Carstairs case *supra* and yet the town of Errol, in New Hampshire, was not permitted to tax logs cut in Maine, because

they did not constitute a part of the mass of property of the
138 State of New Hampshire. The Court says: "We take it to be a point settled beyond all contradiction or question that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments with their houses and effects, and property belonging to or in the use of the Government of the United States." And in speaking with reference to property the product of the State of New Hampshire that had been gathered at an entrepot in the State for transportation from the State, the court says: "It can be taxed as all other property is taxed in the place where it is found, if taxed or assessed for taxation in the usual manner in which property is taxed and not singled out to be assessed by itself in an unusual and exceptional manner. If thus taxed in the usual way

that other property is and at the same rate and subject to like conditions and regulations the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the State, it must
139 be treated in all respects as other property is treated."

No one can read this case without being forced to the conclusion that the property sought to be taxed must be a part of the general mass of property in the State, must be subject to its laws, its processes, its jurisdiction and its dominion, and, in the levying and collection of taxes, must not be made subject to special methods or subjected to unusual treatment.

With regard to the property taxed in the case at bar, the right to tax does not exist if it is founded upon the hypothesis that this property is a part and parcel of the great general mass of property situated within the State. That it is not and that it is not subject to the jurisdiction of the State is fully confessed and admitted by the State by the enactment of a special law for the purpose of the assessment and collection of the tax. No other property in the State is subject to similar treatment. That it is not subject to the
140 laws or the processes of the State for the enforcement of its laws, and therefore belongs to a jurisdiction other than that of the State is fully declared in the opinion of this Court in the case of the Commonwealth of Kentucky *vs.* E. H. Taylor, Jr., (101st Ky. 331).

We believe we have now accomplished what we promised in the beginning, to demonstrate to a mathematical certainty that whiskey in a U. S. Government distillery bonded warehouse is not a subject matter of taxation by the State while it is held by the Government in its possession for a tax laid thereon by it. Having done this, it is necessary now only that we shall show that the warehouseman, who is charged with being the custodian of the property and who as an individual is subject to the jurisdiction of the State, its laws and its processes for the enforcement of its laws, can not be made liable for a tax assessed against property over which the State has no jurisdiction or dominion. Section 409, p. 1446 Kentucky Statutes provides: "Any person or corporation having
141 the custody of such spirits (whiskey in a United States Government distillery bonded warehouse) on the 15th of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interest and penalties which may accrue, and any warehouseman or custodian of such spirits who shall pay such taxes and interest and penalties, shall have a lien for the amount so paid with legal interest from the date of payment."

The property described in the statute, not being subject to jurisdiction and dominion of the State, its laws and its processes for the enforcement of its laws, belongs to another jurisdiction. The warehouseman, having knowledge of certain facts by reason of his obligation to the sovereign power in whose possession, custody and control the property is, by the State is compelled to report certain facts to its officers as designated in the statute amongst which facts

to be reported is the number of barrels of whiskey in the
142 warehouse and the value thereof per barrel, and this is to form the basis of an assessment upon this valuation of a tax against the warehouseman making the report. The State laws can and do operate upon the warehouseman. He, individually, is within the jurisdiction and subject to the laws of the State and by affixing heavy penalties for a failure to report these facts, he is compelled, by law, to make the report. It has been decided time and again that the Government officers, the collector of the district and the storekeeper in charge, and who hold possession of the warehouse and the whiskey stored therein for the Government, can not be reached by any process of the State for the enforcement of its laws or for the purpose of compelling him to report the facts that are required to be reported by the warehouseman.

There is no provision whatever in this law to impose this tax on the owner of the whiskey, nor is he made responsible in any
143 way for the payment of any tax thereon. Therefore, the owner of the whiskey need not be considered in determining this case, as he unquestionably is purposely left out, this being a special proceeding under a special law passed for the purpose. As said, there is no mention anywhere in this statute made of the owner and no responsibility for any tax is created against him, and no responsibility is created in behalf of the warehouseman against such owner for the payment of any tax assessed on the whiskey that is paid by the warehouseman for him on his property in event the whiskey shall be exhausted by the superior lien of the Federal Government for its tax or for any other cause fails to repay him.

If the Government should change its laws, which it has full power to do at any time, after the assessment and before the whiskey is removed from the warehouse, in such a way as to destroy the value of the property so that it would not pay anything beyond the Government's claim, the warehouseman, whose liability has been
144 fixed by the assessment against him personally of a tax upon the property of another person would have no valid legal claim against the owner of the property for such taxes assessed by the State against the whiskey and against such warehouseman as the custodian of the whiskey and which he has been compelled to pay for the owner on his property. That the warehouseman, under this statute, must look alone to the property on which the tax is laid and not to the owner of the property for whom the tax is paid, if a loss ensues, is beyond question. The fact that the whiskey may remain in the Government bonded warehouse for eight years, after the assessment of taxes against the warehouseman has been made on account of it and his liability thereby become fixed, awaiting the pleasure of the owner or of the Federal Government for its removal, is sufficient of itself to prove that the custody, control and possession of the property is not in the warehouseman, and, inasmuch, as the State, after it attempts to make him liable and
145 fixes his responsibility by an assessment, can furnish him no legal remedy or process by which he can proceed immediately against the whiskey or the owner to free himself from this re-

sponsibility but must wait for a long time (for he can do nothing until the Government tax is paid and possession of the whiskey surrendered to the owner), the State can not legally compel him to pay the taxes of another.

The State, by the statute, gives a warehouseman a lien on the whiskey for the taxes assessed against him after he has paid the taxes. This lien is brought into existence by the payment of the tax and not by the assessment of the tax. The liability of the warehouseman begins with and become fixed by the of the warehouseman is discharged before he has a lien upon the property, for he can have no lien until he pays the tax. The lien is intended as full compensation and consideration of the State compelling the warehouseman to pay the taxes of the owner
146 of the whiskey. The State, by providing that this lien shall not begin or take effect at the time of the assessment, but after the whiskey is removed from the distillery premises confesses its want of jurisdiction and dominion over it while in the custody of the Government and its officers. The State can not give the warehouseman more than it possesses, but it must possess the power before it can obligate the warehouseman to pay taxes on another's property and it must transfer to him sufficient power armed and equipped with proper legal processes in the hands of its officers, to enable the warehouseman at any and all times, after his liability becomes fixed by the assessment, to protect himself fully against loss by seizure by virtue of such process of the property itself. It is true the warehouseman has a limited connection with the warehouse and a knowledge of the contents thereof which do not amount either to a custody, control or possession. These are with the Government and its officers. His knowledge and his connection do not give him power over the property. He is as powerless to reach, handle
147 or in any way control this property as the variest stranger, or as the officers of the State themselves are. The warehouseman, as an individual, is subject to the jurisdiction and dominion of the State. So is the United States Collector of the District and the storekeeper and gauger, as individuals, are subject to the jurisdiction and dominion of the State. These officers have this property in their possession, custody and control. The warehouseman has not. The relation of the State to the warehousemen and these officers is the same, but their relation to the property is essential different. Could the State, by laws enacted for the purpose, assess taxes against these Federal officers individually on account of the whiskey, charging it to be in their custody? No, it could not. It is in their custody, it is true, but their custody is the custody of the Government. The State can reach the individual by its laws but not the property and not being able to exercise jurisdiction or dominion over the property, it can not exercise jurisdiction
148 or dominion over the individual on account of the property, for the individual does not and can not exercise dominion over the property himself, and as it is with these officers, so it is with the warehouseman.

Having thus, as we believe, shown that the individual—the ware-

houseman—although subject to the laws of the State as an individual, is not legally liable for taxes assessed on property that is not subject to the jurisdiction and dominion of the State, in conclusion we ask the Court to answer these questions:

First. Is the whisky, as stated in the case of the Commonwealth *vs.* Taylor, in the custody, possession and control of the Federal Government?

Second. If it is, is it also in the custody of the warehouseman?

Third. If it is in the custody, possession and control of the Federal Government, is it, while so held, subject to the jurisdiction, dominion and laws of the State and its processes for the enforcement of its laws?

149 Fourth. If it is not subject to the laws of State and its processes for the enforcement of its laws, as is declared by this Court in the Taylor case and by all other Courts in all other cases, can the State tax property that is not subject to its jurisdiction, its dominion and its laws.

Fifth. If the property is beyond the jurisdiction of the State, its dominion and not subject to its laws, can the State assess taxes against a person within its jurisdiction on account of property so circumstanced?

Sixth. Must not the property, the basis of the tax, as well as the person required to pay the tax on account of the property, be within the jurisdiction of and subject to the dominion of the State and its laws and subject at all times to its processes for the enforcement of its laws?

Seventh. Can the State create a liability against one person to pay taxes on the property of another person if the State can furnish to the person, rendered liable by its laws for the tax, no legal process against either the owner or the property for his protection

150 against loss and can furnish him no legal remedy or means whereby he can discharge immediately, if he so desires, such liability?

Wherefore, we respectfully ask a rehearing of the case.

J. B. THOMPSON.

151 And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 3rd day of October 1906, the following was entered, to-wit:

THOMPSON
*v.*
COMMONWEALTH OF KENTUCKY, by, Etc.,
Franklin.

The Court being sufficiently advised it is considered the motion and petition of appellant for a rehearing, be and the same is overruled.

Be it remembered that on the 2nd day of November 1906, there was filed in the office of the Clerk of the Court of Appeals as Assignment of Errors, and which is hereto attached, as follows:

152 Supreme Court of the United States.

J. B. THOMPSON, Plaintiff in Error,
*vs.*
COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Defendant in Error.

*Assignment of Errors.*

The plaintiff in error assigns the following errors committed, to his prejudice, by the court of appeals of Kentucky in its judgment in the case lately pending in said court wherein the plaintiff in error was appellant and the defendant in error was appellee, viz:

1. The court erred in holding that the plaintiff in error had the custody, as provided by the State statute that he should have, of the property sought to be subjected to taxation by the State.

2. The court erred in holding that the plaintiff in error, as the owner of the United States Government distillery bonded warehouse, was, or could be made, liable by the laws of the State for the taxes assessed by the State on whiskies stored therein not owned by him, but the property of another, in disregard of the provisions of the Constitution of the United States, and especially the 14th amendment thereof.

3. It is admitted in the record that the property is not the property of the plaintiff in error but is the property of some other person and it has been held by the appellate court of Kentucky that this property—distilled spirits in a United States Government distillery bonded warehouse—was in the absolute custody, under the control, and in the actual possession of the United States Government and its revenue officers, held for taxes, and the court erred in holding, in the case at bar, that this property was in the custody of the
153 plaintiff in error and that he should be compelled to pay the tax assessed against him on account of such property, for he, by such judgment, is compelled to pay taxes levied on the property of another person and is thus, by the judgment of the court, denied the equal protection of the law, his property is taken without due process of law and for public purposes without just compensation, in violation of the provisions of the Constitution of the United States, and especially the 14th amendment thereof, against it.

4. The court erred in holding that the property—whisky stored in a United States Government distillery bonded warehouse—is situated within the State within the meaning — Sec. 420 Ky. Statutes.

5. It being admitted that the property is in the custody, possession and control of the Federal Government and held by it for taxes, the court erred in holding that, while the Government so held it, it was subject matter of taxation by the State, was subject to the jurisdiction and dominion of the State and its laws, and its processes for the enforcement of its laws.

6. The court erred in departing from the precedent established

in the case of the Commonwealth against E. H. Taylor, Jr. Co. (101 Ky., pp. 330-331) and in not holding that this property is exempt from the operation of the laws of the State and its processes for the enforcement of its laws, and erred in holding that the State can tax tangible personal property that is not within its jurisdiction nor subject to its dominion and its laws.

7. The court erred in holding that the State can assess taxes against a person within its jurisdiction on account of tangible personal property which has an actual physical existence within
154 the geographical boundaries and territorial limits of the State, although the property itself is beyond the jurisdiction of the State and not subject to its dominion or its laws.

8. The court erred in not holding that the property—the basis of the tax—as well as the person required to pay the tax on account of the property, must be within the jurisdiction and subject to the dominion of the State and its laws. and subject at all times to its processes for the enforcement of its laws, before the State can legally either tax the property or the individual on account of the property.

9. The court erred in holding that the State can create a liability against the plaintiff in error to pay taxes levied on the property of another person when the property is in the custody, control and possession of the United States Government, another and superior jurisdiction to that of the State, and when the State can furnish to the plaintiff in error, rendered liable by its laws for the tax, no legal process against either the owner or the property itself for his protection against loss on account of such liability imposed by the statute on him.

10. The court erred in holding that the word "custody" used in the statute to create liability on the part of the plaintiff in error, does not mean the actual possession at the time of the assessment and the legal right to keep and control the property by the plaintiff in error.

11. The court erred in holding that the State can, by the device resorted to in the enactment of the statute sought to be enforced, assess tangible personal property for taxation that is not within its jurisdiction or subject to its dominion or to its laws and its processes for the enforcement of its laws at the time of the assessment.

12. The court erred in holding that the State can legally collect taxes assessed against tangible personal property that is
155–165 not within its jurisdiction or subject to its dominion at the time of the assessment, because the property claimed to be so assessed may subsequently be brought within its jurisdiction and become subject to its laws.

13. The court erred in holding that the State can assess taxes against the plaintiff in error on account of tangible personal property that belongs to another person that is not within its jurisdiction or subject to its dominion at the time of such assessment, on the ground that the State anticipates or expects, and because it is probable that, in the ordinary course of commerce, the property claimed to be so assessed may be brought within its jurisdiction and become subject to its dominion, and that the plaintiff in error, against

whom the taxes are so assessed, may come into possession and control of the property at some future date.

14. The court erred in holding that the fact of the actual physical existence of the property—distilled spirits stored in a United States Government distillery bonded warehouse, which is tangible personal property—within the geographical boundaries and territorial limits of the State, is sufficient, of itself, to make the property a subject matter of taxation by the State, in disregard of the fact that it belongs to another and superior jurisdiction and is not subject to the laws of the State imposing the tax or to any process of the State for the enforcement of its laws.

15. The court erred in holding that an assessment made on the property, or on the warehouseman on account of the property, is not a process of the State for the enforcement of its tax.

16. The court erred in holding that notice constitutes due process of law in disregard of the fact that the law imposing the tax is itself void.

166 17. The court erred in holding that this property—distilled spirits stored in a United States Government distillery bonded warehouse—is taxed in the usual way that other tangible personal property within the State is taxed and subject to like conditions and regulations and, that the warehouseman, who is made liable for this tax, is made subject to like conditions and regulations and liabilities, and possesses the same right and power over this property that warehousemen possess over other tangible personal property, for which a warehouseman is, by law, made liable for the tax thereon, and erred in holding that the property sought to be taxed in the case at bar, constitutes a part and parcel of the great general mass of property in the State by which it is surrounded, and that the State laws act equally and uniformly thereon with such other property by which it is surrounded, in disregard of the fact that this property is not within the jurisdiction of the State, is not subject to its laws or any processes of the State for the enforcement of its laws.

18. The court erred in not holding the State statute which is sought to be enforced in the suit at bar absolutely void, because the same, for the reasons set forth above, is repugnant to and in conflict with the Constitution and laws of the United States and especially to the 14th amendment thereof.

19. The court erred in its decision wherein is drawn the question by reason of the facts above stated, of the validity of the statute of the State wherein the question is raised that said statute is repugnant to the Constitution, treaties and laws of the United States and the decision of the State court is in favor of the validity of said statute.

J. B. THOMPSON,
*For Plaintiff in Error.*

[Endorsed:] Filed Nov. 2, 1906. J. Morgan Chinn, Cl'k.

167 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error to the Supreme Court

of the United States, and which Writ of Error, with the order allowing the writ is hereto attached as follows:

168 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. B. Thompson, Appellant, and Commonwealth of Kentucky, by T. C. Albritton, Revenue Agent, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said J. B. Thompson, Plaintiff in Error, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the
169 28th day of November, 1906, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the United States Circuit Court for the Eastern District of Kentucky, At Frankfort, this the 29th day of October A. D. 1906, and of the Independence of the United States the 131st year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
*Clerk U. S. Court Aforesaid.*

Allowed by—
J. P. HOBSON,
*Chief Justice Court of Appeals of Kentucky.*

[Endorsed:] Filed Nov. 2, 1906. J. Morgan Chinn, Cl'k.

170 And on said date there was filed in the office of the Clerk of the Court of Appeals, the Original Citation, with proof of service endorsed thereon, and which is hereto attached and is as follows, to wit:

171 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky by T. C. Albritton, revenue agent, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, thirty days from this date, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of Kentucky, wherein J. B. Thompson is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 29th day of October, A. D. 1906.

J. P. HOBSON,
*Chief Justice of the Court of Appeals of Ky.*

Accepted by the Commonwealth of Kentucky, defendant in error, this October 29, 1906.

JNO. W. RAY,
*Attorney for Commonwealth of Kentucky and for T. C. Albritton.*

Filed Nov. 2, 1906.

J. MORGAN CHINN, *Clerk.*

172 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures, following to-wit:

JOHN B. THOMPSON, Appellant,
*v.*
THE COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Appellee.

*Bond on Writ of Error.*

Know all men by these presents; that we John B. Thompson as principal, and D. Meschendorf, as surety are held and firmly bound unto the appellee, the Commonwealth of Kentucky by T. C. Albritton Revenue Agent in the just and full sum of Two thousand dollars ($2,000.00) to be paid to the said appellee its attorney or assigns to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents sealed with our seals, and dated the 2nd day of November, 1906.

173 Whereas lately in the Court of Appeals of the Commonwealth of Kentucky in a suit pending therein between John B. Thompson, appellant, and the Commonwealth of Kentucky by T. C. Albritton Revenue Agent appellee, a judgment was rendered against the said John B. Thompson, and the said appellant has obtained a writ of error, and filed a copy thereof in the Clerk's office of said Court, to reverse the judgment in the aforesaid suit; and a citation directed to the said Commonwealth of Kentucky, by T. C. Albritton Revenue Agent citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington on or before thirty days from the date hereinabove written.

Now the condition of the above obligation is such, if the said John B. Thompson shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

J. B. THOMPSON,
D. MESCHENDORF,
By J. MORGAN CHINN,
*Att'y in Fact.*

174 Signed, sealed and delivered in presence of
J. MORGAN CHINN, *C. C. A.*

Approved by
J. P. HOBSON,
*Chief Justice of the Court of Appeals of Kentucky.*

175 And with said Bond there was filed a Power of Attorney from D. Meschendorf to J. Morgan Chinn, and which Power of Att'y is in the following words and figures to wit:

*Power of Attorney.*

From D. Meschendorf, of Louisville, Ky., to J. Morgan Chinn, of Frankfort, Ky.

Know all men by these presents: That I, D. Meschendorf, have made, constituted and appointed, and by these presents doth make, constitute and appoint J. Morgan Chinn my true and lawful attorney for me and in my behalf, as surety, to make, sign and acknowledge a bond in such form as is prescribed by the statutes of the United States to be executed by J. B. Thompson, as principal conditioned for the prosecution of an appeal by him from a judgment of the Court of Appeals of Kentucky to the Supreme Court of the United States, hereby approving, ratifying and confirming all that
176 my said attorney may do or lawfully cause to be done in the premises by virtue of these presents.

In testimony whereof I do hereby sign and acknowledge these presents and affix my seal this 30th day of October, 1906.

D. MESCHENDORF.

STATE OF KENTUCKY, *County of Jefferson, ss:*

On this 30th day of October, 1906, before me, Zella M. Hulse, a notary public for County of Jefferson in the State of Kentucky, duly appointed to take proof and acknowledgment of deeds and other instruments, came D. Meschendorf to me personally known to be the individual described in and who executed the preceding instrument, In testimony whereof I have hereunto set my hand and affixed my notarial seal at Louisville, Ky., the day and year first above written. My Commission expires Feb'y 9, 1908.

ZELLA M. HULSE,
[SEAL.] *Notary Public.*

177 THE COMMONWEALTH OF KENTUCKY,
*The Court of Appeals, set:*

I, J. Morgan Chinn Clerk of the Court of Appeals of Kentucky certify that the foregoing pages contain a full, true and complete transcript of the record, and proceedings had in the Court of Appeals of the Commonwealth of Kentucky including the opinion of said court in the action of John B. Thompson, Appellant, *v.* The Commonwealth of Kentucky, by T. C. Albritton, Revenue Agent, Appellee, as full and complete as the same remains on file and of record in my office, which transcript I herewith return in pursuance of the Command of the Writ of Error thereto attached. I also certify that the original Assignment of Errors, the original Writ of Error, and the Order allowing the Writ of Error, the Original Citation with proof of service endorsed thereon, a copy of the Writ of Error bond, and copy of Power of Att'y from D. Meschendorf to J. Morgan Chinn, are hereto attached and herewith returned.

178 In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at the Capitol at Frankfort this the fifth day of November A. D. 1906.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
*Clerk of the Court of Appeals of Kentucky.*

Endorsed on cover: File No. 20,466. Kentucky court of appeals. Term No. 160. J. B. Thompson, plaintiff in error, *vs.* Commonwealth of Kentucky, by T. C. Albritton, revenue agent. Filed November 22d, 1906. File No. 20,466.

# Supreme Court of the United States.

**October Term, 1906.**

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JNO. B. THOMPSON,
*Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, ETC., BY T. C. ALBRITTON, REVENUE AGENT,
*Defendant in Error.*

Objection to Motion, by Plaintiff in Error.

The plaintiff in error comes and objects to the motion made herein by the Commonwealth of Kentucky, defendant in error, to docket this case at the present term and to advance it for hearing and decision, and for cause of objection thereto, says:

The state has obtained a judgment against the plaintiff in error from which this appeal is being prosecuted and such judgment is now fully secured and ultimate payment guaranteed by the bond of the plaintiff in error. This judgment bears interest and the defendant in error is not losing anything by any delay.

The suspension of this judgment by this appeal bond does not suspend the rights of the defendant in error as to any other person against whom it has or claims to have delinquent taxes. There is no injunction sought or granted in this action against the state or any local ju-

risdiction to restrain it from the exercise of any claimed right to assess and collect taxes on whisky stored in a U. S. government distillery bonded warehouse, or interest thereon, and no right or power of the state is suspended by this action. The state can still proceed and is proceeding, to assess and collect its taxes and interest thereon against this class of property and against all other classes of property the same as if this action were not pending. If the state has the right to assess and collect taxes on this class of property and is so doing (as it is in fact doing), it is no disadvantage to the state to refuse to advance this case, for, up to the final decision of it, the state will continue to collect its taxes. This is all the state could gain by the most favorable decision and an adverse decision would stop this right at once. It is, therefore, not the interest of the state to advance, but to postpone the final decision of the case, and continue to collect taxes.

The amount involved in this suit is but a few hundred dollars, sixty per cent. of which is penalties, all of which penalties go as fees to the state's agents and representatives. The public interest is involved only to the extent of forty per cent. of the judgment.

In a day or two there will be before this Court, if it is not here now, on appeal, another case very similar to this one, of Rosenfield and others, plaintiffs in error, against the state of Kentucky, defendant in error, which involves questions somewhat similar to those which are to be determined in this case, and it is best for these two cases to be heard together, which can be done if this case is not advanced and taken up out of its regular order. There are many other questions in the case at bar besides those mentioned by the defendant in error in its notice; important questions at that and taking the facts as they

are—that the state's rights are not suspended; that its claims in the case at bar are fully secured and will not be jeopardized by failure to advance; that there is no question of public interest presented; that the revenues of the state will not be affected unfavorably until after the final decision of the suit as it is free to proceed and is proceeding with the collection of taxes on this class of property—we don't believe that the public interest requires the advancement of this case, nor that it should be taken up out of its regular order.

We, therefore, for these reasons, object to the motion of the defendant in error.

J. B. THOMPSON,
For Plaintiff in Error.

160.

# Supreme Court of the United States

## OCTOBER TERM, 1906.

JNO. B. THOMPSON, - - - Plaintiff in Error

vs. Notice.

THE COMMONWEALTH OF KENTUCKY, &C., BY T. C. ALBRITTON, REVENUE AGENT, Defendant in Error

NAPOLEON B. HAYS,
Attorney General,

JOHN W. RAY,
Att'y for Defendant in Error.

*Geo. A. Lewis Publishing House Print, Frankfort, Ky.*

# Supreme Court of the United States

**OCTOBER TERM, 1906.**

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JNO. B. THOMPSON, . . . . . Plaintiff in Error.

v. NOTICE

THE COMMONWEALTH OF KENTUCKY, &c., BY
T. C. ALBRITTON, REVENUE AGENT, Defendant in Error.

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The plaintiff in error, Jno. B. Thompson, will take notice that on Monday, January 7, 1907, at the hour of convening of the Supreme Court of the United States, or as soon thereafter as we may be heard, in the city of Washington, D. C. We will move the court to docket at the present term thereof, and to advance for hearing and decision the case above styled, on writ of error from the Court of Appeals of Kentucky. The motion and grounds therefor are set out and attached to this notice.

NAPOLEON B. HAYS,
*Attorney General.*
JOHN W. RAY,
*Atty. for Deft. in Error.*

The affiant, John W. Ray, says that he has, this day, placed in the United States mail, enclosed in an envelope, duly stamped and addressed to plaintiff in error, John B. Thompson, at his residence and place of business, Harrodsburg, Ky., and also to him at his office in Louisville, Ky., copies of this notice and motion.

This December ...., 1906.

.....

Subscribed and sworn to before me by John W. Ray, this December ...., 1906.

My commission expires ..... day of .....

.....

Notary Public. Franklin County, Ky.

# Supreme Court of the United States

## OCTOBER TERM, 1906.

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JNO. B. THOMPSON, . . . . . Plaintiff in Error.

v. NOTICE

THE COMMONWEALTH OF KENTUCKY, &c., BY
T. C. ALBRITTON, REVENUE AGENT, Defendant in Error.

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### MOTION TO DOCKET AND ADVANCE FOR HEARING.

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The defendant in error, The Commonwealth of Kentucky, who has brought this action by T. C. Albritton, revenue agent, moves the court to docket this case at the present term, and to advance same for hearing and decision, and for cause therefore, says:

That this action is to collect from plaintiff in error, Jno. B. Thompson, who is a distiller and owner and proprietor of a distillery bonded warehouse in the State of Kentucky, interest on taxes due the State of Kentucky, which taxes were assessed on distilled spirits while in a bonded warehouse, but were not payable till the distilled spirits were removed from the bonded warehouse, the amount sued for and recovered being interest on the

taxes that had accumulated while the spirits were in bond and before the taxes were paid.

The defense presented was that the State could not collect taxes on the distilled spirits while in a bonded warehouse, and as contended, not within the jurisdiction of the State for the purposes of taxation, as it was in the exclusive custody and control of the United States. The trial court and the Court of Appeals held that distilled spirits were subject to taxation by the State and by local jurisdictions and hence this writ of error. The defendant in error respectfully shows to the court that the question presented directly affects the revenues of the State of Kentucky to the extent of at least sixty thousand dollars annually and as much more to the local taxing districts, and in consideration of that fact and the fact that there is here presented a question of public interest, defendant in error respectfully asks that this case be docketed and advanced for hearing and decision.

NAPOLEON B. HAYS,
*Attorney General.*
JOHN W. RAY,
*Atty. for Deft. in Error.*

Office Supreme Court, U. S.
FILED.
JAN 23 1908
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States,

## OCTOBER TERM, 1907.

No. 160

J. B. THOMPSON, - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY,
By T. C. ALBRITTON,
*Revenue Agent.*

Argument for Plaintiff in Error by

J. B. THOMPSON,
Counsel.

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1907.

No. 160

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J. B. THOMPSON, - - - *Plaintiff in Error,*

*vs.*

COMMONWEALTH OF KENTUCKY,
By T. C. ALBRITTON, - - *Revenue Agent.*

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Argument for Plaintiff in Error by

J. B. THOMPSON,
Counsel.

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### SYNOPSIS.

### THE STATUTE.

1. Act of 1892: Kentucky Statute, Chap. 108, Art. 5, p. 1318.

2. Act of 1902: Kentucky Statute, Chap. 108, Art. 5, p. 1444.

3. The changes: Law of 1892, "shall bear interest *as other taxes.* Law of 1902, "shall bear interest *until paid.*"

## PLEADINGS.

A. The suit is not against the owner, nor against the property.

B. But is against the plaintiff in error as warehouseman for a tax on another's property in the possession of the government at the time of the assessment.

C. Answer, to which a demurrer was sustained, contains:

1. Traverse of all material facts.

2. Pleads *custody* was not in plaintiff in error, but in the United States Government.

3. Pleads payment of all *taxes*, and that no interest on taxes was due.

4. Pleads estoppel against the State (a) by the construction given to its laws by the State and its executive departments for many years, acquiesced in and acted upon by plaintiff in error, that the taxes did not bear interest, as now claimed, and (b) by receipt in full or quietus given him by the executive department of the State which is the act of the State.

5. Pleads statute is in conflict with the Constitution and laws of Federal government and void,

(a) Because it is in violation of the 14th amendment in that it deprives plaintiff in error of his property without due process of law.

(b) Because it would deprive plaintiff in error "a person within the jurisdiction of the defendant in error, of the equal protection of the law."

(c) "It takes private property for public use without just compensation."

(d) It attempts to, and if sustained, does exert a power over plaintiff in error on account of property outside the

jurisdiction of the state and beyond its dominion, and which property belongs alone at the time of the laying of the tax, to the jurisdiction of the Federal government, interfering thereby with the proper execution of its constitutional laws.

## OPINION OF THE COURT OF APPEALS ANALYZED AND DISCUSSED.

1. Opinion says property in a United States Government distillery bonded warehouse is *within the jurisdiction* of the State and is subject to the *control* and *dominion* of the *warehouseman*. This is in conflict with the opinion of the same Court in the Commonwealth of Kentucky vs. Taylor, 101 Kentucky, pp. 330 and 331, and is wholly irreconcilable therewith. In this opinion it is positively declared by the Court that this property is in the possession, custody and control of the Government and not subject to the jurisdiction or dominion of the State or its processes for the enforcement of its demands.

2. The opinion says the Government *does not hold the whisky as bailee*. The Supreme Court, in the case of U. S. vs. Farrell, 99th U. S., p. 221, says the Government *does hold the whisky as bailee*, and in the case of the same against the same, in the U. S. Circuit Court, Northern District of Illinois, it is so declared in an opinion by Judge Bloggett, 24 Internal Revenue Record 231. The Court of Appeals of Kentucky may be right, that the government does *not* hold the whisky *as bailee*, but if it is, the Supreme Court *is in error* when, in the above case, it says that the government *does* hold the whisky *as bailee*.

3. The opinion says: "It is property within the State and it receives protection from the State." It is admitted

that the property has an actual physical existence within the geographical boundaries and territorial limits of the State, but it is not within the territorial jurisdiction of the State and is not subject to its dominion. All of which is fully set forth in the petition for a rehearing, page 32 of record print, for which we bespeak a careful consideration by the Court.

4. The opinion holds that the assessment of property and notice of such assessment to the owner or the person charged with the payment of the tax is *due process of law.* Then it must follow that the assessment or notice is a *process of the State;* otherwise, how can it be due process of the State against the property or against the warehouseman for the taxes assessed against the property? And it is by such proceeding the State can and does have process against it and can and does have jurisdiction and dominion over it and can and does subject it to its demands. As there has been no other *process* or *notice,* if this assessment is not a process, the contention by the plaintiff in error that his property is being taken without due process of law is correct. But as against this finding of the Court of Appeals in this case, that the property is subject to this process, assessment and notice or any other process of this State, we cite all the other reported cases in conflict. It has been fully and finally determined by all courts, including the opinion in the case at bar, that whisky stored in a distillery bonded warehouse is in the absolute possession, exclusive custody and control of the Government; that it is not subject to the *processes of the State;* it cannot be reached by judgment, distress warrant or execution; there is no *power* in the State to *subject it to the demands of the State,* (taxes are a demand of the State) until the

*possession* of the property has been surrendered by the government to the owner. (Commonwealth vs. E. H. Taylor, Jr., Co., 101 Kentucky, p. 331; Drake on Judgments, 6th Edition, Sec. 281; Taylor vs. Carryl, 24th Penn., p. 257; Harris vs. Denny, 3rd Peters, p. 292; Clack vs. Peaslee, Vol. 5, Federal Cases, p. 903; Clifford, 2nd Sawyer, p. 428; Case 2803, 5th Federal Cases, p. 1051; McCullough vs. Large, 20th Federal Reporter, p. 311; Fisher vs. Deaudestal, 9th Federal Reporter, p. 145). And the Court, in the opinion in the case at bar, says: "The State does not propose to collect the taxes so long as the spirits are in the *custody* of the Federal Government."

5. The opinion holds that the State law providing the tax is equal and uniform. Waiving the question whether uniformity and equality in the law, if it in fact exists, can confer power to tax where such power does not exist, we hold the law is not uniform as to the liability of a warehouseman for taxes upon other people's property (Section 4023, Kentucky Statutes), but is only uniform as to owners of U. S. distillery bonded warehouses in which whisky upon which the government tax has not been paid is stored and which is held by the government for its taxes. The method and manner in the case of the ordinary bailee of assessing and collecting the taxes is not the same as in the case at bar. The proceeding in this case is founded upon a special statute authorizing a special proceeding by the State against such a warehouseman and was so held to be by the Court of Appeals of Kentucky in the case of the Commonwealth vs. E. H. Taylor, reported in the 38th Southwestern Reporter, page 10, and which is also declared as forbidden in the case of Coe against Errol, 116 U. S., page 117. The law acts with equality and uniformity in

cases where the property is in the possession, custody and control of the warehouseman *as bailee* and subject to the jurisdiction and dominion of the State, as well as of the warehouseman, but in this case the absolute possession, custody and control, not only of the property but of the warehouse itself in which the property is stored, is in the United States Government, a sovereign power superior to the State, and the property is not subject to the jurisdiction nor dominion of the State while so held by the government, and these facts mark the distinguishing features in the cases and destroy the equality and uniformity of the law.

6. The Court of Appeals seems hard driven in this case to uphold an unrighteous claim and its opinion and judgment is not only irreconcilable with all the adjudicated cases, but is in conflict with itself, one declaration contradicting another. In one clause it declares, "the assessment and notice to the person charged with the payment of the tax is due process." When told that this process of the State would create a conflict with the Federal Government, it responds that "the State does not propose to collect the tax so long as the spirits are in the *custody* of the Federal Government, and therefore there can be no conflict, because there is no process of law against it. There is *no* process of the State and yet there *is* due process of the State. In the opening sentences of the opinion the whisky is said to be in the custody of, and subject to the dominion and control of the warehouseman, and yet, later on, the property is said to be in the *custody of the Federal Government*. The State statute, Section 4109, says: "The person having the *custody* * * * * shall be liable for the taxes." It is *custody* that fixes the responsibility on the warehouse-

man, yet here custody is declared to be in the government, and not in him, but he is nevertheless declared to be liable for the taxes which is outside the provisions of the law.

## ERRORS ASSIGNED.

1. The court erred in holding that the plaintiff in error had the custody, as provided by the State statute that he should have, of the property sought to be subjected to taxation by the State.

2. The court erred in holding that the plaintiff in error, as the owner of the United States Government distillery bonded warehouse, was, or could be made, liable by the laws of the State for the taxes assessed by the State on whiskies stored therein not owned by him, but the property of another, in disregard of the provisions of the Constitution of the United States, and especially the 14th amendment thereof.

3. It is admitted in the record that the property is not the property of the plaintiff in error, but is the property of some other person and it has been held by the Appellate Court of Kentucky that this property—distilled spirits in a United States Government distillery bonded warehouse—was in the absolute custody, under the control, and in the actual possession of the United States Government and its revenue officers, held for taxes, and the court erred in holding in the case at bar, that this property was in the custody of the plaintiff in error and that he should be compelled to pay the tax assessed against him on account of such property, for he, by such judgment, is compelled to pay taxes levied on the property of another person and is thus, by the judgment of the court, denied the equal protection of the law, his property is taken without due pro-

cess of law and for public purposes without just compensation, in violation of the provisions of the Constitution of the United States, and especially the 14th amendment thereof, against it.

4. The court erred in holding that the property—whisky stored in a United States Government distillery bonded warehouse—is situated within the State within the meaning of Section 4020, Kentucky Statutes.

5. It being admitted that the property is in the custody, possession and control of the Federal Government and held by it for taxes, the court erred in holding that, while the government so held it, it was subject matter of taxation by the State, was subject to the jurisdiction and dominion of the State and its laws, and its processes for the enforcement of its laws.

6. The court erred in departing from the precedent established in the case of the Commonwealth against E. H. Taylor, Jr., Co. (101 Ky., pp. 330-331), and in not holding that this property is exempt from the operation of the laws of the State and its processes for the enforcement of its laws, and erred in holding that the State can tax tangible personal property that is not within its jurisdiition nor subject to its dominion and its laws.

7. The court erred in holding that the State can assess taxes against a person within its jurisdiction on account of tangible personal property which has an actual physical existence within the geographical boundaries and territorial limits of the State, although the property itself is beyond the jurisdiction of the State and not subject to its dominion or its laws.

8. The court erred in not holding that the property—the basis of the tax—as well as the person required to pay

the tax on account of the property, must be within the jurisdiction and subject to the dominion of the State and its laws, and subject at all times to its processes for the enforcement of its laws, before the State can legally either tax the property or the individual on account of the property.

9. The court erred in holding that the State can create a liability against the plaintiff in error to pay taxes levied on the property of another person when the property is in the custody, control and possession of the United States Government, another and superior jurisdiction to that of the State, and when the State can furnish to the plaintiff in error, rendered liable by its laws for the tax, no legal process against either the owner or the property itself for his protection against loss on account of such liability imposed by the statute on him.

10. The court erred in holding that the word "custody" used in the statute to create liability on the part of the plaintiff in error, does not mean the actual possession at the time of the assessment and the legal right to keep and control the property by the plaintiff in error.

11. The court erred in holding that the State can, by the device resorted to in the enactment of the statute sought to be enforced, assess tangible personal property for taxation that is not within its jurisdiction or subject to its dominion or to its laws and its processes for the enforcement of its laws at the time of the assessment.

12. The court erred in holding that the State can legally collect taxes assessed against tangible personal property that is not within its jurisdiction or subject to its dominion at the time of the assessment, because the proper-

ty claimed to be so assessed may subsequently be brought within its jurisdiction and become subject to its laws.

13. The court erred in holding that the State can assess taxes against the plaintiff in error on account of tangible personal property that belongs to another person that is not within its jurisdiction or subject to its dominion at the time of such assessment, on the ground that the State anticipates or expects, and because it is probable that, in the ordinary course of commerce, the property claimed to be so assessed may be brought within its jurisdiction and become subject to its dominion, and that the plaintiff in error, against whom the taxes are so assessed, may come into possession and control of the property at some future date.

14. The court erred in holding that the fact of the actual physical existence of the property— distilled spirits stored in a United States Government distillery bonded warehouse, which is tangible personal property—within the geographical boundaries and territorial limits of the State, is sufficient, of itself, to make the property a subject matter of taxation by the State, in disregard of the fact that it belongs to another and superior jurisdiction and is not subject to the laws of the States imposing the tax or to any process of the State for the enforcement of its laws.

15. The court erred in holding that an assessment made on the property, or on the warehouseman on account of the property, is not a process of the State for the enforcement of its tax.

16. The court erred in holding that notice constitutes due process of law in disregard of the fact that the law imposing the tax is itself void.

17. The court erred in holding that this property—distilled spirits stored in a United States Government distillery bonded warehouse—is taxed in the usual way that other tangible personal property within the State is taxed and subject to like conditions and regulations and, that the warehouseman, who is made liable for this tax, is made subject to like conditions and regulations and liabilities, and possesses the same right and power over this property that warehousemen possess over other tangible personal property, for which a warehouseman is, by law, made liable for the tax thereon, and erred in holding that the property sought to be taxed in the case at bar, constitutes a part and parcel of the great general mass of property in the State by which it is surrounded, and that the State laws act equally and uniformly thereon with such other property by which it is surrounded, in disregard of the fact that this property is not within the jurisdiction of the State, is not subject to its laws or any process of the State for the enforcement of its laws.

18. The court erred in not holding the State statute which is sought to be enforced in the suit at bar absolutely void because the same, for the reasons set forth above, is repugnant to and in conflict with the Constitution and laws of the United States and especially to the 14th amendment thereof.

19. The court erred in its decision wherein is drawn the question by reason of the facts above stated, of the validity of the statute of the State wherein the question is raised that said statute is repugnant to the Constitution, treaties and laws of the United States and the decision of the State court is in favor of the validity of said statute.

## THE ARGUMENT.

### THE STATUTES.

The Statute of 1892, Kentucky Statutes, Chapter 108, Article 5, page 1318, is substantially as follows:

> Section 4105 provides that "every *owner* or *proprietor* of a distillery bonded warehouse in which distilled spirits are stored shall, between the 15th day of September and the 10th of October each year, report to the Auditor of Public Accounts. * * * Such report shall show the quantity and kind of spirits in such warehouse on the 15th day of September * * * the dates when made, the county, city, town or taxing district in which the warehouse is situated, whether or not the United States Government tax has been paid thereon; if not, the date of the expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the Auditor may require."
>
> Section 4106 provides that "the said reports shall be by the Auditor of Public Accounts submitted to a board of valuation and assessments * * * and said board shall fix the value for the purposes of taxation under this act, *and assess* the same accordingly."

Section 4107 provides, after the assessment is made:

> "The board shall at once notify the owner or proprietor of the warehouse of the amount so fixed, etc."

Section 4108 provides:

> "The board shall certify to the Auditor of Public Accounts the value of the spirits assessed for State tax and said officer shall certify to the said County Clerk of the respective counties, the amount liable for county, city, town or district taxation and the date when the bonded period will expire on such spirits. The report shall be by the County Clerk filed in his office and by him certified to the proper collecting officer of the county, city, town or taxing district for collection."

Section 4109 provides:

"Any person or corporation having the *custody* of such spirits on the 15th day of September in the year the assessment is made, shall be liable for all taxes *due* thereon, together with all *interest and penalties which may accrue;* and any warehouseman or custodian of such spirits, *who shall pay* the taxes, interest or penalties on such spirits, shall have a *lien* thereon for the amount *so paid,* with legal interest from day of payment."

Section 4110 provides:

"Taxes on distilled spirits which may be assessed while in a bonded warehouse, and on which the United States Government tax has not been paid or will not become due before the first day of March after assessment, shall be due on the 1st day of January, May and September next after the said government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear legal interest as other taxes."

(The statute of 1902 strikes out the words "as other taxes" and inserts the words "until paid.")

Section 4111 provides:

"Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored as contemplated in the preceding Section, shall, on the 1st day of January, May and September next after said government tax shall have been paid, become due or be removed from the warehouse, make and transmit to the Auditor of Public Accounts and the Clerk of the County Court in which the spirits may have been at the time of the assessment, a statement sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the government tax has been paid or has become due and what spirits have been removed from the warehouse during the preceding four months; the years in which such spirits were assessed for taxation and the county, city, town or taxing district in which the warehouse is situated

in which the spirits were stored at the time of the assessment, and shall, at the same time pay all taxes and interest on such spirits due the State, county, taxing district, city or town, to the officers entitled to receive the same."

Section 4112 provides:

"On failure of any owner or proprietor of any such warehouse to pay the taxes and interest within five days after the same become due, he shall be deemed delinquent and a penalty of 8 per cent on each years taxes due on the spirits shall attach."

This was the law from 1892 until June 1902 when the law was re-enacted as found in Article 5. Chapter 108, page 1444 of the Kentucky Statutes, Carroll Compilation 1904, with only one material change in Section 4110, which, in the act of 1892, read: "and taxes on each year's assessment shall bear legal interest *as other taxes.*" In the new law of 1902, the words "as other taxes" were stricken out and the words *"until paid"* substituted. This amendment or substitution of "until paid" for "as other taxes" changes entirely the meaning of the law and changes the provisions of the law as to the time when interest should be charged and collected on the taxes and was evidently made for this purpose and none other. Under the law which was in force from 1892 to June 17, 1902 the entire claim of the defendant in error, if it has any, accrued against the plaintiff in error, which law reads: "and the taxes on each year's assessment shall bear legal interest as other taxes" and this is the law that must be applied in the case at bar. The law of June 17, 1902 which reads: "and the taxes on each year's assessment shall bear legal interest until paid" can not be made retroactive to sustain the claim sued for. It must stand or fall by the provisions

of the law of 1892 which said "and the taxes on each year's assessment shall bear legal interest at other taxes." As other taxes did not bear interest or penalties until after they had become due and delinquent, which must be presumed to have been known to and acted upon by the legislature at the time of the passage of the act of 1892, the taxes sued for in this case did not bear interest until due which was on "the first day of January, May and September next after the said government tax became due or be paid or when the spirits are removed from the warehouse." The interest under the law in 1892, if any is due, is due and owing *as interest* and *not* as a part of the taxes. The taxes are one thing; the interest another. A careful reading of the law will make this manifest.

Section 4109 says:

> "Any person or corporation having the *custody* of such spirits * * * shall be liable for all taxes *due thereon*, together with all interest and penalties which *may accrue.*" The taxes *are due;* the interest and penalties *may accrue.* And Section 4112 says "the penalty of 8 per cent is on taxes. There is no penalty on interest as a part of the taxes."

## THE PLEADINGS.

The pleadings show that the plaintiff in error is not sued for any *taxes* claimed by the State to have been collected by him from the owner of the whisky as it was withdrawn from the United States distillery bonded warehouse. It is admitted that all taxes that had been collected had been reported and that all taxes reported had been paid. Prior to the filing of the suit against the plaintiff in error a certain definite and conclusive construction had always been placed upon the provisions of

the statute of 1892, the one under which this claim arises, as to the question of interest on taxes. The State, its departmental officers, the auditor, the treasurer, the attorney general, and in fact all of its administrative officers which, in themselves, constitute the State government, had declared that this provision of the statute of 1892, "and these taxes on each year's assessment shall bear interest as other taxes" meant that these taxes did not bear interest until after they had become due, been reported and the person charged with the payment of the tax had become delinquent. No proposition seems clearer than that the State, under the provisions of the constitution and laws, must act by and through its duly elected and appointed officers who, in all matters connected with its executive departments in the administration of its public affairs, must act for it, and that the State is and must be bound conclusively by their acts. The action of one of the great executive departments of the State, like that of the Auditor, is the *act of the State*, and except it can act through these agencies established for this very purpose, the State is powerless to act at all. This is not a case where a subordinate officer has failed to discharge his public duty or to collect a tax, but it is the action of one of the great executive departments of the State, its highest officers, and is the act of the State itself. Therefore when the State acted and one of its great executive departments acting for it, settled with the plaintiff in error, giving a receipt in full for all the taxes that he had collected or that were claimed and which had been paid over under the direction of the State, if a loss ensued as to interest on taxes by reason of a re-construction of the law growing out of a change made in it by a subsequent statute, this

loss must fall upon the State and not upon the taxpayer, who has been compelled to pay the taxes upon the property of another and has long since released the property, to that other, upon which, by the terms of the statute, he is given a lien for the taxes due and for the interest and penalties that may accrue. These principles are fully determined and declared in the case of the United States against Dewitt C. Farrell et al,in the U. S. Circuit Court of the Northern District of Illinois, July 8, 1878, 24 Int. Rev. Rec. page 231, the opinion being written by Judge Bloggett, in which he says:

> "An examination of the case shows, however, that this was a case where the United States itself, or rather the department itself, was at fault and not the officer of the department, in which I think there is a clear distinction."

Referring to the case of Clinkenbeard, et al., vs. United States, 23d Wallace 65, decided in the Supreme Court, he further says:

> "The operations of the distillery were suspended in that case for a number of days by reason of the failure of the Treasury Department to appoint a storekeeper, and the suit was brought against the distillery for recovery of the amount of tax which the distillery should have paid according to its capacity, or in other words, for its capacity tax, and the Supreme Court simply held that during the time the operation of the distillery was suspended for the want of a store keeper, the capacity tax should not be charged against the distillery. The case is clearly placed upon the neglect of the *government* and not upon the neglect of a subordinate officer of the government, to perform his duty."

The construction given to this statute for many years by the State and its department, and which has been acquiesced in by everybody else concerned, that "these taxes

did not bear interest until after they had become due and delinquent" is not denied but is admitted in the State's petition against the plaintiff in error in this case wherein it admits the payment of all taxes and charges that he failed to pay interest upon taxes from the date of the assessment until paid. The plaintiff in error had, at each successive time, as required by the statute, reported and paid the taxes that he had collected, the last payments being made about May 1902, and upon payment, had taken the receipt and quietus of the Auditor of the State against any further claim of the State against him on account of these matters. It seems that public policy demands that there should and must be some repose given to the taxpayer against such unjust claims as these. The enormous amounts offered in fees from penalties alone to revenue agents and others who are in nowise responsible, nor is the State in costs or other expenses, has induced the institution of endless suits against taxpayers for false and doubtful claims, until the State has been dragnetted from one end to the other by these vultures in search of prey. A system of spies and informers has been brought into existence for the collection of taxes—a system that has long since been condemned and abandoned by every form of civilized government. It results in numberless charges and counter-charges, of black mail, greed and graft—which are too frequently true—first, against the taxpayer and then the State. The harrassment of the citizens by these spies and informers under such a system of laws, if permitted to go on for any length of time, will eventually breed a feeling of contempt by the public for the law that fails to protect it if not positive hostility to the State and the enforcement of any of its laws however just. The hist-

ory of this case, if known to the Court, would exhibit in a most glaring light the evils of such a system. These suits reach back five years. The taxpayer had settled in full with the State for the taxes assessed against him on account of the property of another declared to be in his custody. The law of 1892 read as we have indicated, and the construction given to that law had been allowed by the very auditor who appointed these revenue agents, and this construction had become in effect the law. At the suggestion of the auditor, in 1902, a different language was put into the law and the words, "as other taxes" stricken out and "until paid" substituted therefor. More than a year after the act of 1902 went into effect and but a few days before the auditor who secured the enactment went out of office, every distiller in this State was sued to compel him to pay interest on taxes, which interest he had not collected, nor could he collect under the law as then construed, for there was no liability on the owner for this interest and no claim against the property.

I make these statements to the court to show that this claim is totally without merit; that under the law as understood by all persons interested at the time, the plaintiff in error paid to the State the last penny that was demanded by the State; that if more than he paid then is demanded now, the property on which he could have enforced his lien has long since passed out of the State and into the channels of general commerce, and any lien that he had thereon has been lost by the action of the State. There is no justice, no equity and no merit in this claim. It is as unrighteous, as inequitable and as unjust a claim as has ever yet run the gauntlet of a court of justice and escaped unwhipped.

If the facts in the case are as we state them—and there can be no dispute of the facts—the State, having given such a construction to the law as prevented the plaintiff in error from collecting from the owner of the property stored in the warehouse legal interest on these taxes from the date of the assessment, must be bound by such construction. The plaintiff in error was authorized to collect only that which was demanded of him at the time by the State—the taxes, and not interest. If the State, by a subsequent reconstruction of its law, demands and collects more than it demanded and collected at the time—and after the plaintiff in error has acted in accordance with the law as it stood at the time he acted and failed to collect interest because of the act of the State—it is a most flagrant and outrageous act of extortion on the part of the State against him.

Notwithstanding the general rule that the Supreme Court will follow the State courts in the construction given by the State courts to State laws, yet, if it is manifest, as it must be from the facts disclosed in this record, that such construction by the State courts results in an extortion against the taxpayer, this court should not hesitate to right such a wrong, because the law itself and the construction of the law is void and property taken is taken without due process of law, and for public purposes without just compensation in violation of the constitutional provision against it.

## THE QUESTIONS SUBMITTED AND ERRORS ASSIGNED.

Section 171 of the Constitution of Kentucky provides:

"Taxes shall be uniform upon all property *subject to taxation* within the territorial limits of the author-

ity levying the tax and all taxes shall be *levied and collected* by *general laws.*"

Section 4020 of the Statutes of Kentucky provides:

"All real and personal estate *within this State* * * shall be subject to taxation."

The question arises, is distilled spirits stored in a United States Government warehouse and in the custody of the government a subject matter of taxation by the State? What is "within the State" within the meaning of this statute? It is obvious that this provision cannot be universal in its application. It must be and is subject to many limitations and exceptions. We contend that all real and personal estate that has an actual physical existence within the geographical boundaries and territorial limits of the State without exception is not included in the provision "within the State," as subject matter of taxation by the State; that only such real and personal estate as has an actual physical existence within the geographical boundaries and territorial limits of the State and which constitutes a part of the general mass of property within the State affected alike by all laws passed relative thereto which laws are in conformity to the above provision of Section 171 of the Constitution of Kentucky and which is subject to the dominion of the State and jurisdiction of the State and its laws and processes for the enforcement of its laws, is or can be included within the meaning of the term used in the statute "within the State."

That the mere presence or actual physical existence of property in the state does not confer jurisdiction to tax property asserted to be in the state which is beyond the jurisdiction of the state is fully determined and declared

in the recent case of Buch vs. Break (U. S. 206, p. 402), in which the court says:

> "But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside or beyond the jurisdiction of the state.
>
> "Jurisdiction of the state of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send in to the state of Indiana these evidences of debts owing him by residents of Ohio. The question still remains, *was there any property within the jurisdiction* of the state of Indiana so as to *permit* that state *to tax* it, *simply because of the presence* of the Ohio note in that state?"

Here the distinction is fully established and maintained as to *mere presence* and *actual physical existence* of property within the tate, and property within the *jurisdiction* of the state. It is not within the state within the meaning of the law unless it is within the jurisdiction also, and jurisdiction cannot be conferred by mere presence or actual physical existence within the state.

The fact of the actual physical existence within the geographical boundaries and territorial limits of the State of the property, if real estate or tangible personal property, as in the case at bar, is not the controlling or determining factor in the case. The controlling and determining factor is the sovereign power of the State over the property, and the question is, is the property within its jurisdiction and subject to its dominion? And if it is not, it is beyond its taxing power? That the Federal Government has power to levy a tax on distilled spirits for revenue purposes cannot be controverted, and if it does that its power over the subject matter is supreme and therefore exclusive, has been fully adjudicated. The Supreme Court in the case of McCullough vs. Maryland, 4th Wheat, 316, says:

"That the Constitution and the laws made in pursuance thereof are supreme; they control the Constitution and laws of the respective States, and cannot be controlled by them. The people of a State give to their government the right of taxing themselves and their property at its discretion. But the means employed by the Government of the Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the *sovereign power of a State extends* are subjects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which *exists* by *its own authority* or is introduced by its permission; but does not extend to those *means* which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to *use* the *taxing power of a State* on the *means* employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring upon one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

But notwithstanding the judgment in this case, in the case at bar we have two distinct and independent sovereignties—the Federal and the State—both seeking to exercise jurisdiction and dominion over the same property as a subject matter of taxation by both. The right and power of these two sovereignties relative to this subject matter of

taxation cannot, in the nature of things, be equal, co-ordinate and concurrent. The right of the one must be and is superior to the right of the other. There can be but one supreme power. The question cannot be avoided, Which is the supreme power? The determination of this is a Federal question, and must be and can only be finally and authoritatively answered by the Supreme Court of the Federal Government.

That the power of taxation is an essential and inherent attribute of sovereignty and belongs, as a matter of right, to every independent political community cannot be successfully denied, and yet it has been held by the Supreme Court in all cases that from the composition of the American Union, an individual State cannot tax the property, agencies or the means employed by the Federal Government, nor so adjust its revenue system as to obstruct, embarrass or nullify its operations or its functions. The rule of law governing this matter and fixing the rights of the Federal Government and the State is the same that holds between other independent sovereignties, and each is supreme within its sphere and power. This is reciprocal, and as the States cannot, by taxation or otherwise, interfere with the means or agencies selected by the Federal Government as necessary or convenient for its operation or to the exercise of its functions, nor impede, injure or obstruct it (the Federal Government) in any way in the execution of its constitutional laws, so, on the other hand, the Federal Government cannot, by taxation or otherwise, impede, hinder or obstruct the means and agencies selected by the States for the purpose of exercising their functions while acting within their sphere and within their power. It is therefore self evident that whatever pertains to the juris-

diction of the one is excluded from the taxing power of the other in the same manner and to the same extent as if they were independent sovereignties and to the same extent as if the property sought to be taxed was situated beyond the territorial limits of the power, whether State or Federal, seeking to exercise dominion over it.

If the Federal Government has levied a tax on distilled spirits and selected it as one of the means or agencies necessary or convenient for the purpose of raising revenue for its support, the State cannot adjust its revenue system so as to obstruct, impede, embarrass or nullify the laws of the government. It is true that by the terms and provisions of this Act the State postpones the collection of its taxes (Sec. 4110, Ky. Satutes, p. 1447) "until after the said government taxes become due or be paid or when the spirits are removed from the warehouse." By this provision of the statute the right of the State is made to depend upon the happening of an event at an uncertain time. No certain or definite time is fixed for the collection of the taxes. They are to be paid after "the government taxes become due or be paid or when the spirits are removed from the warehouse." If the State has the right to tax this species of property—spirits in a United States Government distillery bonded warehouse, in the custody and possession of the government and held by it for taxes—because it has an actual physical existence within the geographical boundaries and territorial limits of the State, then it has power and dominion over it and it is optional with the State to what extent or in what direction it will exercise that power, whether in regard to or indisregard of the right of the Federal Government. The State has here undertaken to avoid any conflict with the Federal Government by postponing

any attempt to collect its taxes while the property is in the *custody* of the Federal Government, and by this has surrendered its power to tax (if it had any) until possession is surrendered by the government to the owner. This postponing of the collection of the tax does not and cannot confer upon the State a power to tax, and the necessity for the enactment of a special law authorizing a special proceeding, and the declaration in the opinion that "the State does not propose to collect taxes so long as the spirits are in the custody of the Federal Government" is a confession that the State possesses no such power. The power to tax must exist in the State independent of the fact in whose possession and custody the property is at the time of the imposition of the tax, and as to the property affected the State must be the supreme power. It must not be forgotten that we are dealing with sovereignties and their powers, rights and authority as independent sovereignties and not with courtesies and comities between sovereigns. It seems to us that it must be conceded, and is conceded by the law of the State as enacted and by the construction given to it in the opinion in the case at bar by the Appellate Court of Kentucky, that the Federal Government, by taking this property into its possession, its custody and under its control, in pursuance of its laws, intended to exclude and does exclude the State from any and all power, authority, jurisdiction or dominion over it for any purpose while so held, in the same manner and to the same extent as if it had so declared and provided by special laws passed for the very purpose. The Court of Appeals, in the opinion in the case at bar, recognizes and concedes this when it says:

"Great stress is made in the argument upon the fact that there is an attempt on the part of the state to impose and collect a tax upon property in the custody of the Federal Government, that this would lead to a conflict of jurisdictions, and as such is an interference with the soverneignty of the Federal Government."

"In the first place, there is no such conflict, for the State does not propose to collect the taxes so long as the spirits are in the *custody* of the Federal Government."

The court attempts to escape from the inevitable consequences, of a conflict, by saying: "The state does not propose to collect the taxes so long as the spirits are in the *custody* of the Federal Government." Can the state have power to impose a tax on distilled spirits in the custody of the Federal Government and not have power to collect the taxes so imposed while the property is so held? In the case of Knowelton vs. Supervisors, 9th Wis., p. 410-418; Harris vs. Wood, 6 T. B. Monroe (Ky.), p. 641, it is held: "Taxation is the act of laying a tax. It is the process or means by which the taxing power is exercised." Hence the imposition or laying of the tax is an exercise of the power of taxation over the property. There can be no fine spun distinction made between the imposition of a tax and the exercise of the powers of taxation in the assessment and collection of the tax. The imposition of the tax is the exercise of the powers of taxation in the same manner and to the same extent as the actual collection of the tax itself would be; in fact, the assessment and collection of the tax merely follows as an incident to and a consequence of the imposition or the levying of the tax. No particular form or mode of procedure is necessary or required for this purpose. In fact, it has been held that the enactment of the statute,

which statute imposes a tax, is of itself a process or proceeding against the property and may, when no other mode is prescribed, operate as an assessment of the tax. (Harris vs. Wood, 6 T. B. Monroe (Ky.), p. 641).

And, while the imposition of the tax need not be an actual taking of the property taxed into the possession of the sovereign power laying the tax, yet the power to take must exist at the time of the imposition or the tax is not laid, and if the power to take immediate possession of the property where it is tangible personal property does not exist, the power to tax does not exist. The power to take immediate possession is but seldom exercised on the imposition of the tax or on the assessment of the tax, or even on the collection of the tax, except where for collection, the State sells tangible personal property for its taxes, for it must have and deliver possession, because a sale is not complete without the delivery of possession of tangible personal property that is capable of manual delivery.

If the State can impose the tax it can assess the property for the tax and where the tax is of the ad valorem character, as in the case at bar, the assessment is for the purpose of fixing the amount due and to be paid as taxes and for which a warrant or suit as authorized may afterward be maintained. If the State has power to assess the tax, this being a process of the State for the purposes indicated, it can immediately proceed to collect the tax by a sale of the property itself. If it has no power to levy the tax, or to assess the tax, it cannot collect the tax, for all of these constitute but one thing and that is taxation of the property by the State.

"The power to tax (McCullough vs. Maryland, supra) involves the power to destroy. The power to destroy may

defeat and render useless the power to create; and there is a plain repugnance in conferring upon one government the power to control the constitutional measure as of another, which other in respect of these very measures is declared to be supreme over that which exerts control." And in the case of the United States vs. James A. Reckert, Vol. 188, U. S., pp. 438-439, Supreme Court says:

> "To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State, is to say they may be sold for taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances."

Therefore, no hair-splitting distinction or difference as to power can be made, indulged or maintained between the imposition of a tax, the assessment of a tax and the collection of a tax, where the question relates alone to the power to tax. It takes all of these and perhaps many other powers, to constitute and make complete the power of taxation. These acts necessary and essential to the exercise of the taxing power, when performed, constitute the taxing power itself. They can not be segregated or separated as is attempted to be done by the Court of Appeals of Kentucky in the case at bar, for the concrete existence of all of these powers at one and the same time in the sovereignty is absolutely essential to the possession of and the exercise of the taxing power.

We trust we have shown that the Federal Government has supreme power of taxation over this subject matter and having exercised that power in the exercise has taken exclusive possession, custody and control of the property itself. The power of the Federal Government to tax this

subject matter *being supreme, arrests and suspends,* for the time being, all power of the State, which is *subordinate in power* to the Federal Government, to tax this same subject matter while in the custody of the Federal Government, and if the power of taxation by the State over this same subject matter is suspended, it is a complete, and not a partial suspension, of its power and includes all the powers of taxation, even the power to impose the tax.

An examination of the internal revenue laws of the Federal Government relating to the imposition and collection of its tax upon distilled spirits and the constructions that have been given to the provisions of these laws by the courts, are not only cumulative evidence of the correctness of the views we have expressed that the State has no power to impose a tax on spirits in the custody of the Federal Government and held by it for its taxes, but is conclusive thereof. What effect do these laws have upon the character of the holding by the government of this property and what effect do they have upon the power of the State to tax it and also the responsibility of the warehouseman to the State for its tax? There is a very marked distinction between distilled spirits as a subject matter of taxation by the government and other subject matter within the State taxed by it. The spirits are taken into the possession, custody and control of the Federal Government and separated by it from the general mass of property in the State of which thereafter they form no part while so held, and are withdrawn from the jurisdiction and dominion of the State. All other property, although it may be taxed by the Federal Government, is not taken into its possession, custody or control, is not separated from the general mass of property within the State, and is still a

part thereof, and, not being withdrawn, is still within its jurisdiction and subject to its dominion. The relation which this property bears to the State and to all other property in the State is described by the Court of Appeals of Kentucky in the case of the Commonwealth against E. H. Taylor, Jr., Co., 101 Kentucky, p. 330, when it says: "An examination of this statute discloses the fact that this species of property occupies a *unique* position in its relation to other property and to the revenue laws of the State."

If this property is, in fact, in the absolute possession, custody and control of the Federal Government, its position is clearly defined by this fact and it is distinguishable from that of all other property in the State upon which the State assesses taxes or taxes against individuals on account of it. All other classes of property taxed are within the juridiction, subject to the dominion of the State, and subject to its laws and its processes for the enforcement of its laws. This property is not. The State cannot, by any process whatsoever, subject it to its laws while it is in the custody of the Federal Government.

The sections of the internal revenue laws referred to are as follows:

1st. The government, by Section 3251 of the statute, levies a tax on all distilled spirits.

2d. Distilled spirits include whisky. Section 3248.

3d. The distiller is compelled by law to provide a warehouse. Section 3271.

4th. All spirits produced are to be deposited in this warehouse. Section 3287.

5th. This warehouse and its contents are in the custody of the collector and storekeeper assigned. Section 3271, as is also the distillery premises. Section 3267.

6th. The tax is a lien on the spirits, distillery, etc. Sections 3251, 3262.

7th. And although the distiller must be the owner in fee simple of the property upon which the distillery is located, or must free it from all other liens, yet before he commences the operation of distilling he must give the givernment notice and make a deed conveying to the government the premises, with a first lien thereon for the purpose. Section ———.

8th. And the tax must be paid before withdrawal or removal from the warehouse, except as provided by law. Section 3296.

9th. The *owner,* as well as the distiller, may pay the tax and withdraw the whisky. Section 3294.

10th. The *owner,* as well as the distiller, may export whisky without the payment of tax. Section 3330.

11th. The Constitution of the United States provides that no tax or duty shall be laid on articles exported from any state. Art. 1, Sec. 9, Sub-sec. 5.

12th. The *owner* may also transport his whisky in bond from one State to another State (Act of Congress of 1894), and he may remove it from the distillery warehouse for manufacturing purposes, as provided by Section 3433.

13th. For instance, spirits may be withdrawn for scientific purposes under provisions of Section 3287; for use of the United States, under Section 3464; for use in manufacture of sugar, under Act of March, 1891, and for schools, colleges, hospitals, schools for training nurses, and for chemical laboratories, for preserving specimens of anatomy, etc.

14th. During transportation the custody is still in the government. Section 3330.

15th. And the *government* has full power and authority to order whisky removed from one warehouse to another. Section 3272.

These provisions of the laws establish these propositions: That the distillery itself, the warehouses and all of the apparatus situated upon the premises, as well as the premises themselves, the grain and other material used in the manufacture of the spirits pass from out of the jurisdiction and from under the dominion of the State and into the jurisdiction and under the dominion of the Federal Government, a sovereignty superior to the State, and into the custody, possession and control of the Federal Government and its officers. The spirits are, in fact, *made* in the possession, custody and control of the Federal Government and its officers, and so remain until they are tax-paid by the owner, the distiller or some person authorized to pay the tax, and removed from the distillery bonded warehouse.

By this fact—the possession, custody and control of the government—and other conditions arising under these revenue laws, this class or species of property is so circumscribed that it is as completely cut off from the general mass of property by which it is surrounded and from mingling therewith or becoming a part thereof as if it did not, in fact, exist. The distillery and the warehouse in which the spirits are made and stored, are located upon a tract of land designated upon a plat and plan filed with the collector of internal revenue and designated by metes and bounds in a conveyance to the Federal Government. Around it is thus drawn the magic circle of governmental

possession and control so sacred that no one dare cross it for any purpose whatever without the permission of the officers in charge and then only for such purposes as they are authorized by law to permit. The real estate—the distillery premises, including the warehouses—are not property taxed by the Federal Government and, although taken into possession and control, it is not to collect a tax imposed on it, but to prevent evasions of the tax imposed on the spirits, and frauds on its revenues. The real estate not being taxed by the Federal Government and held in custody for a different purpose, its position in relation to other property and the revenue laws of the State is clearly distinguishable from that of spirits taxed and in the custody of the Federal Government. The real estate is within the jurisdiction of the State and subject to its dominion and to the laws of the State and its processes for the enforcement of its laws. The spirits are not. The fact that the Federal Government has taken into its custody the distillery premises, including the warehouses, for the purpose of supervising the operation of the distiller and to prevent fraud on its revenues, does not suspend or arrest the power of the State to tax this property, but it is different as to the spirits that are taxed and held in the possession, custody and control of the government for its tax. The powers of taxation by the State extend to all property except the spirits. These powers extend to the very doors and walls of the warehouse in which the spirits are stored, but here its powers stop—here its sovereignty ends. The Federal Government, by its laws, says *to the State,* as it says *to the warehouseman* and all others when it *closes and locks the door* of the warehouse:

> "*Keep out. Inside* of this house is *my kingdom* and *my dominion* and everything herein is within *my sovereign jurisdiction* and subject alone to *my power; nobody* dare enter here except with my permission and with my consent."

It seems quite clear that until this property is withdrawn from the custody and possession of the government and has been delivered by it to the owner, it cannot mingle with and become a part and parcel of the general mass of property within the State by which it is surrounded, and therefore is not subject to its jurisdiction or its dominion, its processes or its demands, although it has an actual physical existence within its geographical boundaries and territorial limits and cannot be made the subject matter of taxation by the State for any purpose. It is as much beyond the jurisdiction of the State as if it were physically located outside of the territorial limits of the State.

This insurmountable barrier of governmental possession and control which arrests and suspends the power of the State to tax, is recognized in the case of Commonwealth vs. E. H. Taylor, Jr., Co. (101 Ky., p. 330), in which the court says:

> "These barrels are deposited by them (government officers) in bonded warehouses which are *absolutely under the control* and *in the possession* of the United States revenue officers and the *actual possession of these packages* is held and retained by the government for the payment of the tax thereon * * *. Neither the distiller (the warehouseman, who is sought to be charged in this suit with the payment of the tax) nor *any one else* is permitted *to enter these warehouses* except in the presence of the Federal officer and then *only for the purpose of repairing packages* or removing them after the tax due the United States Government has been discharged."

And, again, on page 331:

"While the whisky is in the bonded warehouses *in the custody* of the United States Government *its right to the possession* of the property *is supreme.* It is not liable to any of *the processes* of the State courts. It cannot be reached by judgment, distress warrant or execution (Drake on Judgment, 6th Edition, Sec. 281, and Taylor vs. Carryl, 24th Penn., p. 257), and *there is no power in the State to subject it either to the demands of the State* or to the claims of creditors *until the lien* of the government for its taxes has been fully discharged and *the possession of the property surrendered to the owner.* The law authtorizes the payment of the tax due the United States Government at any time after it has entered into the bonded warehouses and until the end of the bonded period, which is eight years, and owing in the manner in which the title to the property is transferred and the uncertainty when the lien of the government will be discharged and *its possession surrendered to its owner,* it is almost impossible for the State officials to know when any particular package will be surrendered *to its owner and be liable to processes in their hands,* as it would require a constant guard at each distillery bonded warehouse in order to be informed when each separate package came out of bond, so that the tax might be collected thereon. Under these circumstances, the legislature *in effect* made the distillers *agents* of the State to collect *from the owner* of the whisky the tax."

It is futile to attempt, as the Court of Appeals of Kentucky does in the case at bar, to make a distinction or difference as to whether the Federal Government held the whisky as bailee or has a lien on and held it in custody for its taxes. We have shown that the Federal Government held it as bailee (U. S. vs. Farrel, 99 W. S. 221). But there is no magic in the word bailee and any holding or custody, if legal, is as good. If the Federal Government held it in lien for its taxes or has custody of the property for any purpose—which is conceded in the opinion in the

case at bar—in accordance with the principles settled in the above case (Taylor), "there *is no power* in the State to *subject it to the demands* of the State * * * * *until the lien* of the Government for its taxes *has been fully discharged* and the *possession* of the property *surrendered* to the *owner*" Then either holding is good, whether as bailee or in lien for taxes. If all the facts stated in the (Taylor, supra) case are true and the principles therein declared sound, there was and is left from these but one legal and logical conclusion, that could have been pronounced by the court, and that is, that this property is not a subject matter of taxation by the State until the lien of the Federal Government is satisfied, its custody ended, and possession surrendered to the owner. It seems strange to us that the court did not take this last step and pronounce this conclusion.

These principles are fully sustained by the other adjudicated cases and we might say in all cases where the property is in the possession of the Federal Government and in the custody of its officers and held by it, whether for purposes of taxation or for any other purpose. In the case of Harris vs. Denny, 3d Peters, p. 292, the Supreme Court laid down this broad proposition, that property in the hands of the United States held for taxes cannot be attached by State officers. The reason assigned in this case is that if the State has any right or power to control or otherwise possess itself of the custody of this class of property, it would destroy the government's right to control it for the purpose of collecting its taxes, and this must necessarily result in a conflict of jurisdiction between the two powers, State and Federal. The State cannot control it for the purpose of taxation and the government also con-

trol it for purposes of taxation. The power of one over it must be superior to the power of the other. It cannot be in the custody of the government and its officers and at the same time in the custody of the State and its officers, nor can it be in the custody of the distiller or the warehouseman. In the case of Clark vs. Peaslee, 2830 Vol. V., Federal Cases, p. 903, it is held that "whisky stored in a distillery bonded warehouse and goods and merchandise stored in a custom warehouse occupy identically the same relation to the government and to the State, that there is no difference between the two as in both cases, the property is held in the possession, custody and control of the government for the purpose of collecting the tax due the government thereon. And in the case ex parte, Clifford, 2d Sawy., p. 428, Case 2893, Fifth Federal Cases, p. 1051, the court says:

> "Goods in a United States bonded warehouse and on which the duties have not been paid are *in the possession of the United States.*"

In the case of McCullough vs. Large, 20th Federal Reporter, p. 311, the court says:

> "We find no provision in any part of the internal revenue law giving countenance to the idea that a sheriff has the right to enter a bonded warehouse of the United States and seize spirits held therein for the government tax, as the property of the defendant in the execution in his hands, even though he may offer to pay the tax. Our conclusion that the whisky in question is not liable to seizure by the sheriff is well sustained by the adjudicated cases."

Referring to and quoting from Harris vs. Denny and also from Fisher vs. Daudestal, 9th Federal Report, p. 145 as authority, both of which cases relate to *custom house goods*, the court concludes:

> "The present case is not distinguishable in principle from those before cited. The whisky in question

was virtually *in the posession of the United States*—held for internal revenue taxes—and the sheriff could not rightfully disturb that possession."

If the principles declared in the Taylor case (101 Ky., p. 331), and which are fully sustained by the cases cited, "while the whisky is in the bonded warehouse *in the custody* of the United States Government, *its right to the possession of the property is supreme.* It is not liable to any of the *processes* of the State courts, it cannot be reached by judgment, distress warrant or execution, *and there is no power in the State to subject it either to the demands of the State* or to the claims of creditors until the lien of the government for its taxes has been fully discharged and *the possession of the property surrendered to the owner,*" are true, how can the State impose a tax upon this property or assess it for a tax? Notwithstanding the declaration in this case that the State possesses *no power to subject it to the demands of the State* (and taxes are demands of the State), the Court of Appeals in the case at bar sustains the power claimed by the State to assess the property for taxes and to *subject it to the demands of the State,* which is in conflict with all adjudicated cases.

If the State can *exercise no power* over the property and have *no process* against it, how, then, can the State make a *valid assessment* against it, if the *assessment is a process,* as stated in the opinion in the case at bar? To fix liability under this statute on the custodian of the property it must be assessed in the manner prescribed in the statute (Sec. 4106) and notice thereof given to the party to be held liable for the payment of the tax (Sec. 4107). If the assessment is a process, the action in the case at bar did not begin with the filing of the petition against the plain-

tiff in error in this suit, for the taxes or for interest on the taxes, but began when the State exerted or attempted to exert a power over it by subjecting it to this process—the mode of assessment prescribed in the statute—and this is true whether the proceedings be commenced against the plaintiff in error before the property is freed from the obligation of the government tax or afterward. The real controversy relates back to the date of the assessment of the tax against the plaintiff in error on account of the property, for it is then and by the *act of assessment, that his liability* becomes fixed (Sec. 4109 statute), and if the State can exert power over the property while in the hands of the government, the controversy as to which sovereignty, Federal or State, is supreme is not between the individual and the State, but is practically between the State and the government, as the proceeding merely represents a method of the State for the collection of a tax imposed on the means or agencies selected, established and employed by the Federal Government for the purpose of collecting its taxes legally imposed on the property.

The fact that the State has postponed the collection of the tax assessed by it, if it has a right to assess the tax, until after the possession of the property has been delivered by the Federal Government to the owner, does not free the question in this case from the necessity of a construction of the revenue law of the Federal Government determining and defining the powers of the Federal Government over the property, as also the powers of the State relative thereto. The assessment is a summary process for the purpose of fixing liability for the tax on the owner of the warehouse and the party declared to be in the possession and custody of the property, and is and must be a proceed-

ing or process by the State against the property itself in the possession and custody of the Federal Government, for the warehouseman cannot be made liable for the tax on the property if the property itself is not liable for the tax.

By Section 4109 of the statute above referred to, to fix liability on the plaintiff in error, as the warehouseman, for the amount of tax assessed and interest from the date of assessment until paid, an assessment is abolutely required and this assessment, which is a proceeding, must be sustained by virtue of the taxing power vested in the State, legally exercised over the property and the warehouseman.

The assessment is among the first steps taken by the State to subject the property to the tax and to render the parties charged herein liable for the tax. (Harris vs. Wood, 6 T. B. Mon., p. 641). The suit is the final step or culmination of the original process. The proceeding is a unit, though broken up into many bits and each step constitutes but a part of the whole. The beginning of the proceeding, commencing with the assessment, being directed against property held by the Federal Government in its possession for revenue purposes, is void and all subsequent proceedings are void for the State can exert no power or control over it while so held, and if the State can exert no power or control over it, the State cannot assess it nor can it exert power over the individual on account of it. If the assessment, the attempted assessment, or the authorized assessment by the State is an exertion of power or authority by the State over this property in the hands of the Federal Government, a construction of the Federal laws fixing and defining the rights of the Federal Government to the property against the State arises at once and re-

quires a construction of these laws relative to this subject matter. If, on the other hand, it is declared that the State does not exert nor seek to exert, by this assessment, power or authority over this property, then the claimed assessment, the basis of the State's right to this tax, is void, for it must, under the statute, be fixed by an assessment, which is the effect of exercised power.

The Court of Appeals in the opinion in the case at bar seems to very studiously avoid the question whether the assessment is a process or not, and to very guardedly advance in its stead the untenable statement that "The assessment of it and its subsequent distraint for taxes in arrears is not a taking of property without due process of law, if the owner or person charged with the payment of the taxes has had (as he confessedly has had in the case at bar) notice of assessment and the amount due"—for if this proposition were the law and *notice* was all that was required to constitute due process of law, the constitutional guarantee to the citizen would be mere idleness, for the mere passage of an act is notice (Harris vs. Wood, 6 T. B. Mon. 641). What does the phrase, "due process of law," or "law of the land" mean? It means more than a special act passed for the very purpose of authorizing the deprivation; if it had no broader meaning than processes prescribed by act of the legislature, it would be the end of the case. Such a construction would be so narrow that it would render the constitutional guarantee mere nonsense, for it would then mean that no State shall deprive a person of life, liberty or property, or shall deny to any person within its jurisdiction the equal protection of the law or take his property for public purposes without just compensation unless the State shall choose to do so. It has been repeatedly and

uniformly adjudicated that the terms "due process of law" and "law of the land" have a broad, comprehensive meaning and originated in the great bill of rights, the Magna Charta, and operate as a restriction in each branch of the civil government. Therefore, a State cannot, by legislative enactment, deprive a person of his property without due process of law, nor through the medium of a constitutional convention so deprive him any more than it can through an act of the legislature. (Ziebold, 19 Re. Pr. (U. S. Cir.) 742; Clark vs. Mitchell, 69 Mo. 627). The property of a private citizen cannot be taken from him and given to another citizen by the exercise of legislative power in any form. If the law under which the tax is levied is void, any property taken to satisfy it is taken without due process of law. (Beekman vs. Railroad, 3rd S. Y. 73; Dundee Mortgage Co. vs. School District, 19 Fed. Rep. 359).

So, also in the recent case, to which I have before referred, of the Union Refrigerator Transit Co. vs. Kentucky, 199 U. S. 194, in which the Supreme Court says:

> "If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly *within the taxing power of another State*, to which it may be said *to owe an allegiance* and to which it *looks for protection*, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. (Railroad Co. vs. Jackson, 7 Wall. 262; State Tax on Foreign-held Bonds, 15 Wall. 300; Tappan vs. Merchants' National Bank, 19 Wall. 490-499; Delaware, etc., R. R. Co. vs. Pennsylvania, 198 U. S. 341, 358. In Chicago, etc., R. R. Co. vs. Chicago (166 U. S. 226), it was held, after full consideration, that the taking of private property without compensation was

a denial of due process within the Fourteenth Amendment. See, also, Davidson vs. New Orleans (96 U. S. 97, 102); Missouri Pacific R. R. vs. Nebraska (164 U. S. 403, 417); Mount Hope Cemetery vs. Boston (158 Mass. 509, 519)."

Whatever may have been the previous opinion of the court upon this question, it is fully settled and determined now that it is not a question, as stated by the Court of Appeals in its opinion in the case at bar, of notice, but a question of the validity of the tax itself and if the tax is void, no character of notice or procedure by which the citizen is to be deprived of his property amounts to due process of law within the meaning of the constitutional provisions for protecting the citizen.

How is the warehouseman affected by these provisions of the internal revenue laws of the Federal Government and how does it affect his responsibility to the State for its taxes on these spirits if it has power to tax? The warehouseman is not the *owner* of the property and does not *primarily owe* the taxes, nor is he primarily liable for them. His liability, if any, is statutory. and before he can be made responsible, the *law itself must be valid,* and its terms and provisions strictly pursued. If the State has not the power to impose the tax, the law is void.

We call particular attention to the fact that the word *"custody"* is used in the statute sought to be enforced in the case at bar. This is not an idle word. It is *custody* that was intended to and does fix liability on the warehouseman. What is *custody?* Possession and control, with a legal right and power to hold and control. We take it that the State intended to concede and does concede that it has no right or authority to assess taxes against, or compel a person to pay taxes upon, the property of another person, ex-

cept that he has such undisputed custody, possession and control that he is in effect temporarily the owner of the property in a qualified way, and which property is in his possession, custody and control. And that he may, under the assessment, legally hold it against all comers and claimants, and may, immediately upon the payment of the tax enforce, by due process of law of the State, the lien given him for the purpose of enabling him to reimburse himself for the amount so paid by, if necessary, subjecting the property to sale, and that this custody and possession must be of such a character and the control of the article so absolute, that he cannot be divested of this right or defeated by the intervention of any power superior to that of the State, and after the assessment, by which his liability becomes fixed, the property cannot be taken from him by any power superior to that of the State.

If, therefore, it can be shown that whiskies in a United States distillery bonded warehouse are not in *the custody* and *possession* and not subject to the *control* of the warehouseman, then we contend, first, that under the statute such warehouseman is not liable for the tax. Second, if it can be shown that by any means or under any circumstances or conditions which may arise subsequent to the date of the assessment, when the liability of the warehouseman has become fixed by the statute, he may be divested of the custody, possession and control of the property, if he so has it, by some superior power, or other condition, and thereby lose the taxes assessed against him, he is not and cannot be made legally liable for such taxes.

It must not be overlooked that the proceeding authorized by the statute under consideration in this case, is most extraordinary and peculiarly special. In all cases,

even in that of the ordinary bailee who has unqualified possession of the property taxed, it is a departure from the general principles of taxation which require all taxes to be assessed against and paid by the owner of the property. In the very recent case of the Home Savings Bank against Des Moines (205 U. S., p. 519), the court says:

> "If the State has not the power to levy this tax, we will not inquire wether another tax which it might lawfully impose would have the same ultimate incidents. With respect to taxation usually, if not necessarily, property and its owners are inseparable. *Taxes are assessed against persons upon the property they own, and not upon property which others own.* We should be reluctant to hold that there has been any departure from this principle in this law."

The State, by the statute, gives the warehouseman a lien on the whisky for taxes assessed against him when paid. This *lien* is brought into existence by the *payment* of the tax, and *not by the assessment* of the tax. The liability of the warehouseman begins with and becomes *fixed* by the *assessment* and is *discharged* by the *payment*, upon which fact the lien arises in behalf of the warehouseman. The lien is intended as full compensation and consideration of the State's compelling the warehouseman to pay the taxes of another. The State, by providing that this lien shall not begin or take effect at the time of the assessment but after the whisky is removed from the distillery premises, confesses its want of jurisdiction and dominion over it while in the custody of the government and its officers. The State, before it can obligate the warehouseman to pay taxes on another's property, must possess and transfer sufficient power to him to enable the warehouseman to fully protect h[illegible]nself against loss at all

times after his liability becomes fixed by reason of the charge laid upon him by the assessment.

This court knows that no one, not even the distiller or the warehouseman, is permitted to enter these warehouses or in any way or in any manner to exercise any custody or control over this whisky while in these warehouses; that this property is not subject to the laws of the State or any process for the enforcement of the laws of the State, or to any demands of the State; that the State cannot send its assessors into these warehouses or on the distillery premises to count or estimate the quantity or value of this property nor can it send its tax collectors there to attach, distrain or otherwise possess themselves of the property for any purpose; that the warehouseman is as powerless to reach, handle or in any way control this property as the *veriest stranger* or as the *officers of the State* themselves are, and the State *cannot* furnish to *him*, or *to its officers for him, any means, power or process* whereby he can take it from the *custody and possession of* the Federal Government and its officers and transfer that custody and possession to himself or any one else for the purpose of collecting the tax or for any other purpose.

The warehouseman, as an individual, is subject to the jurisdiction and dominion of the State; so is the United States collector of the district, the storekeeper and the gauger, as an individual, subject to the jurisdiction and dominion of the State. The relations to the State of the warehouseman and these officers individually are the same. Can or could the State, by laws enacted for the purpose, assess taxes against these Federal officers individually on account of the whisky charging it to be in their custody? No, it could not; it is in their custody, it is true, but their

custody is the custody of the government. The State can reach the individual by its laws, but not the property, and not being able to exercise jurisdiction or dominion over the property, it cannot exercise jurisdiction or dominion over the individual on account of the property, for the individual does not and cannot exercise dominion over the property himself, and as it is with these officers, so it is with the warehouseman.

If any contingency, condition or circumstances should arise after the assessment, and the liability by such assessment against the warehouseman has become fixed, which would render it impossible for him to enforce the lien conferred by the statute upon him to reimburse himself, he should be by that fact discharged from all liability on account of such assessment. If the State compels the warehouseman to pay the taxes *for the owner* of the whisky and such contingency does occur and the warehouseman is without remedy, it is a mere act of spoliation on the part of the State against one of its citizens. The State could, with equal justice and much more fairness, compel some bank or man of wealth, for its convenience, in every county, to pay his neighbor's taxes, or, in fact, all the taxes in the county, and, as in this case, generously give him a lien on what he could catch for his reimbursement, because the property in this last case is at least subject to taxation by the State and to the jurisdiction and the processes of the State, and in the case of the spirits it is not. If, as contended in this case, a person who is not in the custody, possession or control of the property of another and has no *fixed legal relation* thereto, can be made responsible by an act of the legislature for all taxes assessed against it, or rather against him on account of it, by reason alone

of his propinquity thereto, and such a law be sustained by the court, then there exists no longer any protection against individual spoliation by the legislature, and all property rights must cease, for by simple fiat, it can be taken from the citizen for taxes not his own. If it is taken for taxes not his own but another's, it is private property taken for public uses without just compensation in violation of the constitutional provision against it, except it can be determined that the lien given is sufficient compensation for the property so taken. That such conditions, contingencies and circumstances can and will doubtless arise after the assessment and before the State's tax becomes due as provided by the statute, is clearly shown by an examination of certain sections of the internal revenue law, as stated below:

By Section 3294 the owner can tax-pay his whisky; by Section 3330 the owner, not the distiller or warehouseman, may export his whisky. This right to export is the owner's right and is independent of and superior to any right of the distiller or warehouseman. Again, the Constitution of the United States, Article 1, Section 9, Sub-section 5, provides that no taxes shall be laid on any article exported from any State. This cuts off the enforcement by the distiller or warehouseman of this statutory lien, for the property remains in the possession of the government and its officers during the process of exportation and until it is landed abroad. The owner, with the consent of the distiller, may transport his whisky in bond from one warehouse to another warehouse, as provided in Act of August 28, 1894, Sections 51 to 59, and the government can move it from place to place, as provided in Section 57, and may also transfer it from one warehouse to another warehouse,

from one State to another State, without the consent of the distiller or warehouseman, as provided in Section 3272. The whisky may, in the long period of storage in bond, all leak out and be lost, and yet the warehouseman must pay the tax assessed against him with nothing left to reimburse him. The whisky may be destroyed by accidental fire or other casualty, of which casualties there may be many, and yet, under the provisions of this statute, the warehouseman must pay the tax for another party (the owner of the whisky) assessed against him and still have nothing left to reimburse him. It is a matter of history shown by the report of the Commissioner of Internal Revenue that he has frequently sold distilled spirits (whisky) assessed, for much less than the government tax of $1.10 per gallon, and as low as 40 cents per gallon. Again the powers of taxation by the Federal Government of distilled spirits or whisky is without limit. It can alter, change, modify and repeal its laws in relation to its tax at its discretion. It can increase or reduce it to suit its convenience or its purpose. The Federal tax being a per gallon tax can be increased on all whisky in bond and by the same law reduced on all whisky to be thereafter made.

This has been done, and should it be done again and the difference between the two amount to as much as twenty-five cents a gallon the whisky in the warehouse would not, at public sale, bring the government tax.

Now, if the government tax is not paid by the owner and the government proceeds to sell the whisky, and it fails to bring the amount of the government's tax, what becomes of the lien given to the warehouseman by the State for its taxes assessed against him and which he is compelled to pay? The government has the first lien and

has exhausted the property and in these cases again there is nothing left to reimburse the warehouseman for the taxes paid by him.

Any one of these conditions and contingencies may arise to deprive the warehouseman of all chance to recover the tax assessed against him and which he has been compelled to pay. If the State cannot, by virtue of the constitutional power vested in it, by reason of the peculiar condition in which this class of property is situate, through and by its own duly elected and appointed officers and its legal processes placed in their hands for the very purpose, collect its tax laid upon this class of property, it should hardly expect the warehouseman to do that which it, as a sovereign State, cannot do.

These recited circumstances and conditions are not subject to the control, either of the warehouseman or the State and therefore cannot be invoked by the warehouseman for the purpose of evading the tax. They are the result of the conditions arising from the enactment of these internal revenue laws by the Federal Government and exist independently of and in spite of the warehouseman, and the property cannot be controlled by him or by the State by reason of the existence of these circumstances and conditions. Therefore, to compel the warehouseman under these conditions to pay taxes on the property of another, not subject to his custody or control, is a mere extortion and not taxation.

We next propose to show that the term "situated within the State" used by the court in the opinion is not clear, specific or definite. No one denies that the whisky in a bonded warehouse is "situated within the State" if to be "situated within the State" means nothing more than that

it has a mere presence or a physical existence within the geographical boundaries or territorial limits of the State. But if the term "situated within the State" used by the court in the opinion in the case at bar means more, then we deny the accuracy of the statement. We assert that the fact of the actual physical existence of the real or personal estate within the geographical boundaries or territorial limits of the State, notwithstanding the term used in the statute "within the State," does not include, nor was it intended to include, without exception, for taxation by the State, all real and personal estate within the geographical or territorial limits of the State.

We further assert that such fact—the existence of real or tangible personal property within the geographical boundaries and territorial limits of the State—is not the controlling or determining factor in the case at bar. While this fact—the actual physical existence of real and personal estate within the geographical boundaries or territorial limits of the State—must exist before the State can tax, the State cannot, on this account alone, subject such property to taxation. Buck vs. Break, 206 U. S., p. 402. Therefore, it is not only inaccurate but erroneous to hold that this property is subject to taxation because it has an actual physical existence within the geographical boundaries or territorial limits of the State, in utter disregard of the further fact that it is not subject to the jurisdiction of the State, to the dominion of the State or to the laws of the State and the processes of the State for the enforcement of its laws.

If being "situated within the State" is mere presence and existence and a sufficient reason or fact to uphold the

right of the State to tax the property in the case at bar, it must be a sufficient reason or fact in all cases. If it is not sufficient in all cases then it is, of itself alone, not a sufficient reason or fact in the case at bar, because it does not have the same conclusive and binding force in all cases alike and therefore depends in some cases on some other reasons or conditions attached or detached, connected or disconnected with it to determine its force and effect. If its force and effect is therefore controlled or determined in any case by other facts, reasons or conditions it becomes necessary to examine separately each case to which it is to be applied in order to ascertain whether such other facts or reasons, and not "situated within the State" are, or not, the controlling and determining facts or reasons in such case. We declare, without fear of contradiction, that property situated within the State, within the meaning of the term used in the opinion in the case at bar by the court, must be, not only situated within the geographical boundaries and territorial limits of the State, but must be so situated and in such condition that it constitutes a part and parcel of the great general mass of property within the State by which it is surrounded and being a part and parcel of this great general mass of property is affected equally and uniformly by all laws passed relative to this mass of property of which it constitutes a part. If a law is passed to tax this great general mass of property equally and uniformly the property, to be included within the scope of the law, must be within the jurisdiction and subject to the dominion of the State; otherwise, it is not affected by such law whether statutory or constitutional. If it does not constitute a part and parcel of the great general mass of property, but stands outside of all things by

which it is surrounded with a separate physical existence "within the State" it is not subject to the jurisdiction or dominion of the State, nor a subject matter of taxation by the State.

What property can we cite that has an actual physical existence within the geographical boundaries and territorial limits of the State to show conclusively that "all real and personal estate situated within the State" is not subject matter for taxation by the State for this reason alone?

First: The property of consuls, ambassadors and the representatives of foreign governments situated within the State is not within the jurisdiction of the State nor subject to the dominion of the State, nor taxable by the State. (Coe vs. Errol, 116th U. S., p. 717).

Second: Postoffices, custom houses and, in fact, any property belonging to or in the use of the government of the United States, situated within the State is not within the jurisdiction nor subject to the dominion of the State and is not taxable by the State. (Cooley, Vol. 1, p. 129. Coe vs. Errol, supra).

Third: Indian lands or personal property held by the Federal Government in trust for the benefit of the Indians, situated within the State are not subject matter for taxation by the State. (New York vs. Indian Land, 5th Wallace, p. 761; also, Moore vs. Showalter, 2d Wyo. Ter., p. 8; Auditor General vs. Williams, 94th Michigan, p. 180; Moore vs. Besom, 7th Wyo., p. 292, and Gray vs. Thomas, 5th Oklahoma, p. 1; also, Wagner vs. Evans, 170 U. S., p. 588).

In a very recent opinion in the case of the United States against James A. Reckert (Vol. 188, U. S. Reports, p. 438-439), the Supreme Court says:

> "To say that these lands may be *assessed and taxed* by the county of Roberts, under the authority of the State, is to say that they may be *sold for taxes,* and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes from year to year and thereby keeping the land free of incumbrance."

Fourth: Army and navy equipments, supplies and appurtenances, soldiers' homes, hospitals, quarantine stations, medical supplies, etc. In fact, any and all property belonging to the Federal Government or held for its use for any purpose connected with the performance of its functions, may be situated within the State, but are not, on account of this fact, subject to the jurisdiction and dominion of the State, and a subject matter of taxation by the State.

Fifth: Articles of merchandise stored in a custom house of the Federal Government, although "situated within the State," are not subject matter of taxation by the State. It has been expressly held in regard to this class of property in an unbroken line of decisions, that articles imported from foreign countries are not subject matter of taxation by the State and such articles and the duties paid thereon do not lose their character as imports so as to become a subject matter of taxation by the State as a part of the mass of property situated within the State until they have passed from the control of the importer, or been broken up by him from the original cases; and the State tax is void, whether imposed upon them distinctively as imports, or as constituting a part of the importer's prop-

erty. (Low vs. Austin, 3d Wallace (U. S.), 29; Brown vs Maryland, 2d Whet. (U. S.), 419; License cases, 5th Howard (U. S.), 575; Cook vs. Pennsylvania (U. S.), 97, p. 566; People vs. National Ins. Co., 27 Hun. (N. Y.) 188; Blount vs. Monroe Co., Ga., 61).

Sixth: Property in transit through the State or held for exportation at some entry port, although "situated within the State," does not constitute a part and parcel of the general mass of property in the State, is not subject to the jurisdiction or dominion of the State and is not a subject matter of taxation by the State. (Coe vs. Errol, 166 U. S., 717).

In each of the six cases above mentioned, in the language of the court used in the case at bar, the property is "situated within the State"; that is, it has an actual physical existence within the geographical boundaries and territorial limits of the State, but, by the principles settled and determined in the cases cited and all other adjudicated cases, "situated within the State" does not, of itself alone, make the property a subject matter of taxation by the State in which it is situated.

Again, the property in the case at bar is held by and in the possession of the Federal Government; so is the property in most of the above cited cases where it is declared to be exempt from taxation by the State and this exemption, from the principles laid down in these cases, seems to cover any and all properly held by the Federal Government in its possession or control for any purpose. We, therefore, with perfect candor, ask the opposing counsel to cite us to a single instance mentioned in any case where any State has ever taxed any property held by the Federal Government in its possession, custody and control

for any purpose, and such tax been sustained by any court, except in the case at bar.

It has been repeatedly held that no State can impose taxation on persons, property or other subject matter of taxation which are *not within its jurisdiction.* (Cooley, Vol. 1, p. 129) nor upon property *over which it has no dominion.* (People's vs. McCreary, 34 Cal., 432-456), and in the Foreign held bond case (15 Wall., 300-319) it is said by the Supreme Court:

> "No adjudication should be necessary to establish so obvious a proposition as that properly lying *beyond* the jurisdiction of the State is not a subject matter upon which its taxing power can be legitimately exercised."

And, again, in referring to and quoting from the Louisville, etc., Ferry Co. vs. Kentucky (180 U. S., 385-396):

> "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have a relation to a subject matter *within the jurisdiction* of the taxing power. See, also, McCullough vs. Maryland, 14 Wheat. 316-429; Hays vs. Pacific Mail S. S. Co. (17 How. 596-599); St. Louis vs. Ferry Co. (11 Wall. 423, 429, 431). Morgan vs. Parham (16 Wall. 471-476).

It does not seem that we should be compelled to go beyond the recent case of the Union Refrigerator Transit Co. vs. Commonwealth of Kentucky, 199 U. S. 194. In this case it is said:

> "It is also essential to the validity of a tax that the property shall *be within the territorial* jurisdiction of the taxing power."

These cases clearly establish these principles that the subject matter of taxation, whatever it is, must *be within*

*the territorial jurisdiction* of the taxing power and that no State can impose taxes upon property or subject matter which is *not within its* jurisdiction, or upon property over which it *has no dominion.* These terms, "property lying beyond the jurisdiction of the taxing power," "property not within the jurisdiction of the taxing power," "property over which it has no dominion," "property within the territorial jurisdiction of the taxing power," "property subject to the dominion of the taxing power," used by the courts all mean but one and the same thing. Do the terms *"beyond* and *within* the jurisdiction of the taxing power" refer alone to the geographical boundaries and territorial limits of the taxing power, or do they refer also to the limits and boundaries of its *sovereign power*—the point at which its laws and its processes for the enforcement of its laws ceases to have vital force in the hands of its officers? Is, or not, property, in fact as well as in effect, as much beyond the jurisdiction of the State if as said in the Taylor case "it is not liable to any of the processes of the State," and "there is no power in the State to subject it to the demands of the State" as if the property was physically beyond the jurisdiction by reason of being outside of the geographical boundaries and territorial limits of the State? We thus find the term "within or beyond the jurisdiction of the State" used by the court, is a conclusive factor in determining the power of the State. What difference then does it make to the State which state of facts limits, determines or arrests its powers? Is, or not, the consequence the same both to the State and the warehouseman? If the property is beyond the jurisdiction of the State because its physical existence is located outside of its geographical boundaries and territorial limits and

the property is by reason of this fact not subject to its jurisdiction, its dominion or its laws, is not the property also beyond its jurisdiction if, for any other reason or cause, it is outside of the operation and force of its laws, and do not these expressions or terms used by the courts include both? We claim that they do and that they mean that property, to be a subject matter of taxation by the State, must be within its jurisdiction, subject to its dominion and constitute a part and parcel of the great general mass of property within the State, subject to its laws and, at *all times,* subject to *the processes* of the State for the enforcement of its laws.

Property cannot be said to be within the jurisdiction of a State and subject to the dominion of the State, that is not subject, *at all times,* to the laws of the State, nor can it be said that it is subject to the laws of the State if it is not subject *at any and all times,* to its processes for the enforcement of those laws. If, therefore, the property in fact has such an actual physical existence within the geographical boundaries and territorial limits of the State, in order to ascertain whether it is "situated within the State" within the meaning of the judgment and opinion of the court in the case at bar and whether it is subject to the jurisdiction and dominion of the State, its laws and its processes for the enforcement of its laws, we must apply the supreme test by placing in the hands of or delivering to the proper officers of the State writs or processes directing and empowering them to assess, seize, hold and sell the property for the taxes of the State or any other claims or demands that the State may have against it. If the claimed right by the State to tax does not stand this test—the supreme and only test that can be applied to determine

sovereign power, jurisdiction and dominion—the property is not a subject matter *within the jurisdiction* of the taxing power within the principles as well as within the language of all the adjudicated cases. This, the supreme test, has been applied in many States and, in all the reported cases, upon principles well established, it has been declared. "While the whisky is in bonded warehouses *in the custody* of the United States Government, its right to the *possession of the property is supreme.* It is not liable to any of the *processes of the State Courts,* it cannot be reached by judgment, distress warrant or execution (Drake on Judgment, 6th edition, Sec. 281, and Taylor vs. Carryl, 24 Pennsylvania, 257), and there is *no power in the State to subject it either to the demands of the State* or to the claims of creditors until the lien of the Government for its taxes has been fully discharged and *the possession of the* property surrendered to the *owner.* Commonwealth of Ky. vs. E. H. Taylor, Jr., Co. (101 Ky., p. 330-331); Drake on Judgments, 6th edition, Sec. 281; Taylor vs. Carryl (24 Penn., p. 257); Harris vs. Denny (3rd Peters, p. 292); Clark vs. Peaslee (Case 2830, Vol. V., Federal Reporter, p. 903); In re Clifford (2nd Sawyer, p. 248 case 2893, Fifth Federal Reporter, p. 1051); McCulloch vs. Large (20th Federal Reporter, p. 311); Fisher vs. Daudestel (9th Federal Reporter, p. 145; 30th Internal Revenue Record, p. 166); Treasury Decision, (Vol. 2, No. 21710); Opinions of Attorney General, (Vol. 21, p. 73, 1894); Wisconsin R. R. Co. vs. Price County, (133 U. S., pp. 496-504); U. S. vs. James A. Rickert, (188 U. S., pp. 438-9); Coe vs. Errol, (116 U. S., p. 717); Wisconsin R. R. Co. vs. Price County, (133 U. S., pp. 496-504); Van Brocklin vs. Tennessee, (117 U. S., pp. 151-2).

For the purpose of showing more glaringly the error of the Court of Appeals in the opinion in the case at bar when it holds that this property is subject to taxation by the State because it has a mere presence or physical existence within the geographical boundaries and territorial limits of the State, we will compare it in a very brief way with articles of merchandise (which includes whiskies) that are held in the custom house and in the custody of the Federal Government and its officers for its taxes. Both spirits in a distillery bonded warehouse and spirits in the custom bonded warehouse have a presence or existence within the geographical boundaries and territorial limits of the State.

Both are in the custody, possession and control of the Federal Government. Both are held by it in lien and in custody for its taxes. Both are to be surrendered to the owner on the payment of the tax. Both are exempt from the operation of the laws of the State while in the custody of the Federal Government and held in lien by it for its taxes, and the State has no power over either to subject it to its demands until its possession is surrendered by the government to the owner. Neither is a part or parcel of the general mass of property within the State while held by the Federal Government for its taxes, nor can either mingle with the general mass of property by which it is surrounded or become a part thereof.

With regard to goods in the custom house the rule has long since been settled by numerous decisions of this court:

> "Articles imported from foreign countries are not a subject matter of taxation by a State, and such articles and the duties paid thereon do not lose their character as imports so as to become the subject matter of State taxation as a part of the mass of property of the State until they have passed from the control of the

importer or been broken up by him from the original cases; and the State tax is void whether imposed upon them distinctly as imports or as constituting a part of the importer's property. Low vs. Austin, 3rd Wallace (U. S.) 29; Brown vs. Maryland, 2nd Whet. (U. S.) 419; License Cases, 5th Howard (U. S.) 575; Cook vs. Pennsylvania, 97 (U. S.) 566; People vs. National Ins. Co., 27 Hun. (N. Y.) 188; Blount vs. Monroe Co (Ga. 61)."

And in the case of McCulloch vs. Large (20th Federal Reporter, p. 311) the court, referring to and quoting from Harris vs. Denny (3rd Peters, p. 292), and to Fisher vs. Daudestel (9th Federal Reporter, p. 145), both of which cases relate to goods in the custom house, concludes:

> "The *present case* is *not distinguishable in principle from those before cited.* The whisky in question was virtually in the possession of the United States—held for internal revenue taxes—and the sheriff could not rightfully disturb that possession."

These same principles are established and declared in 30th Internal Revenue Record, page 166, and in Treasury Decisions, Vol. 2, No. 21710; also by the opinions of the attorney general, Vol. 21, page 73, of 1894.

If, then, the cases are not distinguishable and there is no difference, the same principles apply to both, and as seen above the rule as to goods in the custom house is neither in doubt nor in dispute. It therefore must follow that spirits in a distillery bonded warehouse are not a subject matter of taxation by the State while held by the Federal Government in custody and in lien for its taxes.

We will briefly allude to the proposition stated by the Court of Appeals of Kentucky in the case at bar that "it receives the benefit of protection from the State laws," and therefore should pay taxes. Does it receive the same character of protection from the State that it ought to pay

the same taxes as are paid by other properties to the State? We have shown that custom houses, postoffices, army and naval supplies, Indian lands and personalty held for them by the government, the property of consuls, ambassadors and representatives of other foreign governments, articles of merchandise in custom houses and in the hands of the importers, property in transit, all of which receive in a qualified and modified way protection from the State, are not subject to taxation by the State on this account. And why? Because they owe allegiance to another sovereign power, belong to another jurisdiction and are not a part and parcel of the general mass of property in the State. This rule is stated much more clearly and in much greater detail in the case of the Union Refrigerator Co. vs. Kentucky (199 U. S., p. 194), where the court says:

> "The power of taxation, indispensible to the existence of all civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements and schools for the education of his children. If the taxing power be in no position to render this service and such property be within the taxing power of another sovereignty to which it might be said to owe an allegiance and to which it looks for protection, the taxation of such property by the State partakes rather of the nature of an extortion than a tax and it has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law."

Spirits in a distillery bonded warehouse in the custody of the Federal Government and held by it for its taxes needs no protection from the State, a subordinate power, and receives none. A careful reading of the internal rev-

enue laws of the Federal Government will disclose that by the provisions of these laws, it undertook to protect and does protect this property in every way possible from everybody, including the State itself. The State cannot for any purpose, even for purposes of protecting it, assume control over it, or in any way possess itself of it. The State is, in fact, excluded from the distillery premises and prohibited from all acts that could protect. The taxpayer and the property receive no equivalent in protection from the State and share no benefit from any public convenience such as roads, bridges, side-walks, pavements or schools for the education of its children, etc. The State, as "the taxing power (in the case at bar), is in no position to render this service," or any other, "for the property belongs to the jurisdiction of another sovereignty to which it owes an allegiance and to which it looks for protection. The taxation of such property by the State partakes, rather, of the nature of an extortion than of a tax, and it has been repeatedly held to be beyond the power of the legislature and a taking of property without due process of law."

The Federal Government provides the severest penalties for a removal of the spirits from the warehouse without the payment of the tax or without the consent of the government. In the case of U. S. vs. Farrol (24th Internal Revenue Record, p. 231). Also in U. S. vs. Farrol (99 U. S., p. 221), the court says:

> "The distiller must pay the tax on the removal of the spirits. It matters not whether the removal is caused by evaporation, by combustion from fire or by the deliberate act of the distiller; in either case they are removed."

It would be the same if the spirits were the subject of larceny. The spirits would be removed. The spirits are

fully protected from larceny by the laws of the Federal Government. But if they were not fully protected from larceny by the Federal Government, and did in a qualified and modified way receive some protection from the State, to hold that they are a subject matter of taxation by the State on this account is not in accordance with the principles announced in the case of Buch vs. Break (206 U. S., p. 407), in which the court says:

> "It is true if the notes were stolen while in Indiana and they were therein a subject of larceny, the Indiana courts would have to be resorted to for the punishment of the thieves. This consideration, however, *is not near enough* to the question involved to cause us *to change our views* of the law with regard to the taxation of property, and make that *property within the State* which we think is clearly *outside.*"

The courts of the state need not be resorted to for the punishment of thieves for the larceny of spirits from a distillery bonded warehouse. This offense is amply covered by the Federal statute and if the State was resorted to under the principles of the above case it would not confer the powers of taxation where they did not already exist. Therefore, the right of the State to tax spirits in the custody of the government cannot be sustained on the grounds of protection of the property or of the owner or of benefit to either.

The case of Carstairs vs. Cochran (103d U. S., p. 597), referred to by the Court of Appeals of Kentucky in its opinion in the case at bar to sustain it, and upon which the defendant in error seems to rely as conclusive, is, to our minds, easily distinguishable from the case at bar. The questions which we present in the case at bar were not presented or considered by the court in that case, were not

directly in question nor determined; nor are they, indeed, under a strict construction of this opinion referred to. The question in the case (Carstairs, supra) was, first, whether a statute of the State of Maryland was in conflict with the Constitution of that State. It was decided by the Supreme Court of Maryland that it was not, and the Supreme Court held that the decision of the State court upon this question was binding upon it. Second, the right of the proprietor of the warehouse under the statute of the State of Maryland, who pays the taxes, to recover interest thereon. This question was decided against the warehouseman. The question of the power of the State to impose a tax upon distilled spirits in bond, but to be collected after the government lien was satisfied, was not before the court in the Carstairs case, and is, therefore, still open for adjudication. The gravest errors are too frequently committed by courts in assuming that the question submitted in the case under consideration by it has been passed upon and determined in some preceding case, when, upon a more careful reading of the case, it would be found that the direct question involved was not, in fact, submitted or considered. This seems to be one of the errors committed by the Court of Appeals of Kentucky. To show that this is the fact, the Court of Appeals of Kentucky, in its opinion in the case at bar, upon this vital question does not quote the language of the Supreme Court in the case referred to, nor does it refer to any of the authorities cited by it to sustain the principles involved in the case at bar, but contents itself with merely stating its conclusions in its own language from what it conceives to be a proper deduction from the language used by the Supreme Court in discussing the other questions involved and submitted. The fallacy of such a conclusion is manifest from a mere inspec-

tion of the authorities cited by the court in the case of Carstairs vs. Cochran, supra. The court says:

> "The State has undoubted power to tax private property having a situs within its territorial limits and may require the party in possession of the property to pay the tax thereon. Unless restrained by the provisions of the Federal Constitution, the power of the State as to the mode, form and extent of the taxation is unlimited when the subject to which it applies is within her jurisdiction. (State tax on foreign bonds, 15th Wallace, 300-319)."

These principles seem to hav been taken bodily from the case of the Louisville Ferry Co. vs. Kentucky (188 U. S., pp. 385-396), in which the court says:

> "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject *within the jurisdiction* of the taxing power." See, also, McCullough vs. Maryland (4 Wheat. 316-429); Hays vs. Pacific Mail S. S. Co. (17 How. 596-599); St. Louis vs. Ferry Co. (11 Wall. 423, 429, 431); Morgan vs. Parham (16 Wall. 471-476).

Also quoting from the Foreign-held Bond Case (15 Wall., pp. 310-319), said:

> "No adjudication should be necessary to establish so obvious a proposition as that property *lying beyond* the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

It has been repeatedly held that no State can impose taxation on persons, property or other subject matter of taxation which are *not within its jurisdiction* (Cooley, Vol. 1, p. 129), nor upon property over which it has no dominion (People vs. McCreary, 34 Cal., 432-456), and, as said

in a very recent case, the Union Refrigerator Transit Co. against Kentucky, 199 U. S. 194, by the Supreme Court:

> "It is also essential to the validity of a tax that the property shall be *within* the *territorial jurisdiction* of the taxing power."

We have shown heretofore in the argument that these expressions, "property lying beyond the jurisdiction," and "property within the jurisdiction" of the State, refer not only to the geographical boundaries and territorial limits of the State, but also to the limits of the sovereign power of the State, the point at which the processes of the State in the hands of its officers cease to have vital force. This case, except it be understood and applied in this way is wholly irreconcilable with all the other adjudicated cases. The statement in the Carstairs case that "the State has undoubted power to tax private property having *a situs* within its territorial limits," shows that the word situs has a legal meaning. Now, what does the word situs legally mean? It must mean, in order to reconcile this case with all others, that the property taxed has something more than a *mere presence* in the State or *physical existence* within the geographical boundaries and territorial limits of the State, for it was said (Buch vs. Break, 206 U. S., p. 406):

> "We cannot consent to the doctrine that the mere presence of the evidences of debt amounts to the presence of property within the State for taxation. That promissory notes may be the subject of larceny does not make the debt evidenced by them property liable to taxation in the State, when there is no other fact than the presence of the note upon which to base the claim."

The property taxed in the case at bar seems to have been properly described by the Court of Appeals of Ken-

tucky in the case of the Commonwealth vs. E. H. Taylor, Jr., Co. (101 Ky., p. 332), when it says its position with reference to other property in the State and the laws of the State is unique. It is certainly peculiar and queer to the last degree and to such a degree that it has no legal situs in the State if situs means, which it must mean, that it constitutes a part of the general mass of property in the State. It must be in the same position to the State as the property of an individual would be when we speak of it as constituting his estate. It must be connected with the general mass of property and be a part of the general wealth of the State over which it has jurisdiction and over which it exercises dominion and from which it is authorized to and does, by the exercise of its taxing power, collect and receive its revenues for the purpose of performing the functions of a sovereign. It must not be overlooked that this is not a case where the State is undertaking to collect taxes from the owner of the property, but is undertaking to make a person not the owner, on account of some asserted relation that he holds to the property, pay the taxes thereon for the owner, giving him no remedy at all against the owner and only a remedy against the property long after it has been surrendered by the government to the owner and passed into the channels of commerce.

If the principles declared in all the other cases are sound, and with which the Carstairs case would be in conflict if the construction put upon it by the Appellate Court of Kentucky is correct, then the property to be taxed need not be "within her jurisdiction," or subject to the dominion of the State, as it is declared in all the cases, including the Carstairs case, that it should be. Under such a

construction it would be necessary that it should be only within its territorial limits, which is clearly distinguishable from "within her jurisdiction," the one referring to geographical boundaries; the other to sovereign power. To give such a construction to the word "situs" as this would make the Supreme Court in the Carstairs case irreconcilable and in conflict with itself in a paragraph consisting of less than twenty lines, for it says:

> "The power of a State as to the mode, form and extent of taxation is unlimited when the subject to which it applies is *within her jurisdiction.*"

The question is plainly stated whether in this case the situs controls or whether it is a question of jurisdiction and dominion. If situs means mere presence or physical existence in the State, like that of the ambassadors, custom houses, postoffices, naval and army stores, property in transit, and articles of merchandise imported, etc., which have a mere physical existence or presence in the State, and which have been declared exempt from taxation by it, and this is sufficient the State may in this case tax the spirits in a bonded warehouse, but it does not therefore follow that it can tax the warehouseman on account of them.

From these authorities it would appear that three facts must exist before the State has power to tax: The situs—not the mere presence or actual physical existence—of the property must be within the geographical boundaries and territorial limits of the State. The property must also be "within her jurisdiction" and subject to the dominion of the State, its laws and its processes for the enforcement of its laws. The person required to pay the tax must have the custody, possession and control of the property taxed. These principles are not new and are practically the same

as stated in the case of Coe vs. Errol (116 U. S., p. 717). In speaking with reference to property, the product of the State of New Hampshire, that had been gathered at an entrepot in the State for transportation from the State, the court says:

> "It can be taxed as all other property is taxed in the place when it is found, if taxed or assessed for taxation in the usual manner in which property is taxed and not singled out to be assessed by itself in an unusual and exceptional manner. If thus taxed in the usual way that other property is and at the same rate and subject to like conditions and regulations, the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the State, it must be treated in all respects as other property is treated."

No one can read this case without being forced to the conclusion that the property sought to be taxed must be a part of the general mass of property in the State, must be subject to its laws, its processes, its jurisdiction and its dominion, and, in the levying and collection of taxes, must not be made subject to special methods or subjected to unusual treatment.

With regard to the property taxed in the case at bar, the right to tax does not exist if it is founded upon the hypothesis that this property is a part and parcel of the great general mass of property situated within the State. That it is not and that it is not subject to the jurisdiction of the State is fully confessed and admitted by the State by the enactment of a special law for the purpose of the assessment and collection of the tax. No other property in the State is subject to similar treatment. That it is not subject to the laws or the processes of the State for the enforcement of its laws, and therefore belongs to a jurisdic-

tion other than that of the State is fully declared in the opinion of this court in the case of the Commonwealth of Kentucky vs. E. H. Taylor, Jr. (101st Ky., 331). Also 38 Southwestern Reporter, p. 10.

Having shown, as we believe, that the spirits are in the custody of the Federal Government and held by it in lien for its taxes and are, therefore, not a subject matter of taxation by the State, that the State has no power to subject it to a demand of the State while so held, that it is not subject to the jurisdiction or dominion of the State, or its laws or to its processes for the enforcement of its laws, and is not within the State within the meaning of the statute of the State authorizing its taxation by the State; that it constitutes no part or parcel of the general mass of property within the State and, therefore, is not a part of the general wealth of the State; that it receives no protection from the State; that it belongs to a superior sovereign over the State; that it is not in the custody of the warehouseman nor in his possession, nor subject to his control; that the taxes are the taxes of another person upon the property of that other person assessed against the warehouseman on account of that property by the State; that the State can furnish to him no process or legal remedy by which he can protect himself against loss or by which he can subject it to the payment of the taxes assessed against him on account of it, we, therefore, ask a reversal of this case.

J. B. THOMPSON,
*Attorney for Plaintiff in Error.*

PHIL B THOMPSON, JR.,
*Associate Counsel.*

MAR 6 1908
JAMES H. McKENNEY,
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1907.

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*No. 160.*

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J. B. THOMPSON, *Plaintiff in Error*,

*v.*

THE COMMONWEALTH OF KENTUCKY
By T. C. ALBRITTON, *Revenue Agent.*

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## Argument for Plaintiff in Error

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J. B. THOMPSON,
*Attorney for Plaintiff in Error.*

PHIL B. THOMPSON, Jr.,
*Of Counsel.*

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PRESS OF GIBSON BROTHERS,
WASHINGTON, D. C.
1908.

# Supreme Court of the United States.

J. B. THOMPSON, PLAINTIFF IN ERROR,

*v.*

THE COMMONWEALTH OF KENTUCKY.

The case at bar raises a question which this Court has not before been called upon to decide.

We will waive for the sake of the argument the question, whether whisky stored in a distillery bonded warehouse can be taxed by the State and is subject to the operation of the laws and processes of the State, which question we have thoroughly presented in our brief.

Carstairs *v.* Cochran, 193 U. S., p. 10, differs from this case in this. By Chapter 704 of the Laws of Maryland, 1892, as amended by Chapter 320 of the Laws of 1900, an annual tax was laid by the State of Maryland upon whisky stored in distillery bonded warehouses.

Carstairs complained that having paid these taxes for the owner he lost the interest thereon. This Court held that the subject of interest on the taxes was a matter of contract between the warehouseman and the owner, and the State law was not compelled to conform to their contract and therefore dismissed his claim.

The question here is: Can the State of Kentucky having the Constitutional power to lay, by general laws, an annual tax upon property, and having laid such tax by the law of 1892, Chapter 108, Article 5, p. 1318, therein

providing "that taxes upon whisky in bond shall bear interest on each *year's assessment as other taxes*," and by a subsequent act of 1902, see Chapter 108, Article 5 of Carrols' Compilation, p. 1444, can it reach back and collect interest on such taxes *until paid?*

The Constitution of Kentucky, Section 171, is as follows:

> "Levy and collection by General Laws—Uniformity.—The General Assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws (see Section 4119, Ky. Stat.)."

Section 4046 of the Revised Statutes of the State provides that the assessors shall commence their duties the 15th of September of each year.

Section 4052 provides all taxable estate shall be assessed and valued as of that date.

Section 4059, that assessors' work shall be completed etc., etc., by January 1st.

Section 4143: Taxes shall be due March 1st and persons failing to pay by December 1st shall be delinquent and pay six per cent. additional, as a penalty, which the sheriff is compelled to account for by January 1st.

These are the general tax laws passed as provided in the Constitution for all taxable estate.

Now it will be observed that taxes in general are not delinquent until December 1st, the year succeeding the assessment, and then only incur a penalty of *six per cent. additional.* This was what the law of 1892 imposed upon whisky in bond, viz., six per cent, penalty.

The plaintiff in error before the act of 1902 was passed, had paid, under the act of 1892, all the State exacted, and received his receipts or quietus in full from the officers of the State authorized to receive the same.

What he complains of, is that under the act of 1902, a new demand is created and made for six per cent. per annum on taxes which had been paid before the law was passed in 1902, and the property upon which this new demand is based was no longer under his control as warehouseman, but the Government taxes having been settled, the property had either passed out of the State as interstate commerce, or into the general mass of property in the State, and was, if in the State, subject to taxation in the hands of the owner under Section 4058, Article 71, of the R. S. Ky.

If the statement above is true, the six per cent. per annum until paid was a new demand, special in its character and retroactive in its effect in violation of the Constitution of the State of Kentucky and of the Fourteenth Amendment of the Constitution of the United States, which is as follows:

> "S. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The object, intent, and purpose of this amendment was not to operate upon individuals, but to prohibit the States either in their Constitution or by statutes, from depriving

any person of his life, liberty or property without due process of law, or denying him the equal protection of the laws within the jurisdiction of the State, or in any way abridging the immunities or privileges of citizens of the United States.

Therefore a decision of a State Court upon a constitutional question, growing out either of the Constitution of the State itself or any law passed by the State, is not binding upon this Court, where the complaint is made that the rights of the complainant under the Fourteenth Amendment have been violated by such Constitution or law—Cooley on Constitution Limitations, 7th Edition, p. 418, and cases cited.

Story on Constitutional Law, 4th Edition, app. to Vol. II, 16 Wallace, p. 58—94 U. S. p. 542.

> "The records show that the plaintiffs in error relied upon and asserted throughout the entire course of the litigation in the State Courts, that the grant of privileges in the charter of defendant, which they were contesting was a violation of the most important provisions of the Thirteenth and Fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this Court to reverse the judgment of the State Court on those questions is clear and imperative." Slaughter House Cases—16 Wallace, p. 58.
>
> "In the Case of the Society for propagating the Gospel *v.* Wheeler, 2 Gall., p. 139—M[illegible] Justice Story thus defines a retroactive or as he ca[illegible]s it a retrospective law: Upon principle every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective."

That this raises a question under the Constitution of

the United States and amendments thereto, is settled in 16 Wallace, p. 58.

If such was not the law, there would be no restraint upon the State except such as it chose to acknowledge. The provisions of the Fourteenth Amendment would add no more security to the rights and protection of the citizens of the United States than they already enjoyed before its adoption, which citizenship it created. It is only the *immunities and privileges* of this class of citizens which are not to be abridged, but the protecting mantle is thrown over *any person* whether he be a citizen of the United States or not, when and where a State undertakes to deprive him of his life, liberty or property without due process of law or deny him if within its jurisdiction the equal protection of the laws.

The Amendment clearly distinguishes in the three clauses between Citizens of the United States and *any person*, as stated in the last two. An alien or subject of a foreign power can invoke the last two clauses to protect him, as well as any citizen of the United States.

This Court only follows the decisions of the State Courts on questions of procedure or construction of laws involving no Federal law, or constitutional question growing out of the Constitution of the United States, or amendments thereof.

The act of 1902 is not general; it applies only to whiskey which once was in bond. For other property the owner is not compelled to hark back and pay six per cent. interest per annum until paid upon taxes settled at the time they were due, and before they become delinquent.

Six per cent. for eight years makes an addition of 48 per cent. to the taxes already paid, and eight per cent. for not paying what the law never required, and twenty per cent. additional to the 'Auditor's Agent' makes seventy-six per cent. added to taxes, years after they had been settled and receipted for by the collecting officers of the State.

If the State has the constitutional right to collect this additional tax, by passing a retroactive statute ten years after the original law was in operation, is there any limit to the time when it cannot go back? Can it go back under the guise of taxation, interest or penalties, and compel the railroads, banks or other corporations to pay a tax which the law had never provided; if so, how far back and what limit on the amount may be levied? Can it make it so heavy as to confiscate the property? If the State cannot confiscate all the plaintiff's property, can it confiscate a part of it? If so, how much? This is purely a confiscation *pro tanto* of the property of the plaintiff in error. The whiskey had been removed tax-paid from the warehouse, had entered into Interstate Commerce, beyond the reach of the tax laws of the State, or become mingled by the owner, in possession and control, with the general mass of property within the State subject to the tax as prescribed in Section 4058, Article 71, as whiskey, wines and other liquors not in a distillery bonded warehouse. Thus being subjected to a double tax, one upon the owner under the general law, and another upon the warehouseman under the Act of 1902.

To make the warehouseman pay these penalties, when even the quasi possession and control had passed away from him years before the Act of 1902 was passed, is simply confiscation of his property. It would be the same as going back fifty or one hundred years, upon a person who had sold his real estate and obtained his receipts, for penalties which did not exist at the time of his payments but were enacted afterwards. When is an act retroactive or retrospective? As said by Story, *supra*, "when it creates a new obligation or imposes a new duty, etc., in respect to past considerations or transactions."

PHIL B. THOMPSON, JR.,
*Of Counsel.*

# Supreme Court of United States,

OCTOBER TERM, 1907.

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JNO. B. THOMPSON, - - - - - - - - - *Plaintiff in Error*

*v.*

THE COMMONWEALTH OF KY., BY T. C. ALBRITTON, REVENUE AGENT, - - - *Defendant in Error.*

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## Brief for Defendant in Error.

May it please the Court:—

The facts of this case are few and stand admitted. The plaintiff in error is a distiller, engaged in business in Harrodsburg, Mercer County, Kentucky. After complying with the United States revenue law, he engaged in manufacturing whiskey and storing same in a bonded warehouse located on the distillery premises and which he owned. After the whiskey was stored in the bonded warehouse plaintiff issued warehouse receipts and sold same to various parties, undisclosed by this record, as he was authorized and permitted to do under sections 4768, 4770 Kentucky Statutes, shown in appendix. After making and storing the whiskey, and possibly after the warehouse receipts were issued and negotiated, the plaintiff in error reported the same for assessment and taxation under section 4105 Kentucky Statutes, shown in the appendix, and the same was regularly and duly assessed each year as provided by law. At the expiration of the bonded period allowed by the United States Statutes, or

when the United States revenue tax was paid and the whiskey withdrawn from the bonded warehouse, the plaintiff in error reported same to the Auditor of the State of Kentucky and paid what he conceived to be the taxes due the State, but which in fact was not the correct sum due, to the extent that interest on the deferred taxes is required to be paid when the entire taxes are paid at the end of the bonded period for all the years that the whiskey remained in bond, which interest was not paid by plaintiff in error, nor at all.

This action is to collect interest on the deferred taxes, which is a part of the taxes levied, and is imposed on this class of property to equalize it with other property that is required to pay taxes annually.

The Court of Appeals of Kentucky in the case of Commonwealth of Kentucky v. Rosenfield Bros. & Co., 118 Ky. 374, upheld the validity of the statute imposing the tax, as well as that providing for interest thereon and thereby finally determined the force and validity of the Statute so far as the State Constitution is concerned. In this case plaintiff in error did not assail the validity of the Statute because of any inconsistency with the State Constitution, but rests his contention against its validity on a supposed repugnance to the Constitution of the United States and particularly the 14th Amendment.

While he admits that the whiskey in the bonded warehouse is property and is within the territorial limits of Kentucky, he insists that same is not taxable because: (to use his language)

> "It is not subject to the jurisdiction of the State, to the dominion of the State, or to the laws of the State and the processes of the State for the enforcement of the laws."

(Printed record page 34.)

This objection, if valid, goes to the validity of the entire taxes and to the power of the State to tax whiskey in a bonded warehouse located in the territorial limits of the State. There is no question of **situs** presented, for, while it is alleged that at the date of withdrawal from bond plaintiff in error did not own the whiskey, it is not alleged who the owner was, nor even that he did not reside in Kentucky. So it is assumed that, as the whiskey is in the **territorial limits** of the State and its original owner, the distiller, resided in this State, the claim of exemption or immunity from taxation rests alone on the plea that the whiskey was in a bonded warehouse and, under the laws of the United States, in lien for United States Internal Revenue taxes and that the United States had an officer in charge thereof, or as guard over same, to preserve the lien and require the internal revenue taxes to be paid before removal and at the end of the bonded period.

The claim that the whiskey was in the **exclusive** custody and control of the United States officers is fallacious. Taken in the strongest sense that may be, the possession was no greater than a mortgagee in possession or a pledgee in possession. Certainly no greater than the possession of a trustee in bankruptcy, or a receiver of a court.

The owner of the whiskey or the distiller could at any time terminate the supervision and control of the United States officer by payment of the Internal revenue tax. He could and did, as pleaded by the answer, pass the title to the property, subject to the tax liens, by transfer of the warehouse receipts, in accordance with the Statutes of Kentucky.

It might have been sold, assigned, mortgaged or pledged by written instrument properly recorded. It was no doubt insured as the property of its equitable owner, or as that of Thompson as the bailee in possession and the holder of the legal title.

While this whiskey in a bonded warehouse could not have been seized by a State officer and possession taken under a writ from a State Court, still it had protection under State laws and was governed by State laws. In fact, plaintiff in error acknowledged it to be under State laws by issuing warehouse receipts and transferring same under sections 4768 and 4770 Kentucky Statute, as well as by reporting same, for assessment and by paying what he conceived to be the taxes due.

In paragraph 9 of his answer (printed record page 17) plaintiff in error admits that the owner of the whiskey paid to him (plaintiff in error) the taxes, but says that he (plaintiff in error) did not collect the interest sued for. So it appears that the owner of the whiskey did not claim exemption or immunity from taxation, but recognized that the whiskey was not only in the territorial limits of the State, but also subject to its laws and dominion. His (the owners) title was derived under the statute laws of Kentucky and he recognized that sovereignty's right to collect tax thereon and paid a part of the sum due.

Beyond all that, the plaintiff in error, Thompson, collected storage on this whiskey in his bonded warehouse and was given a lien and power of sale to enforce same by Kentucky Statute, section 4773 (shown in appendix).

What then becomes of the plea that it was not in the jurisdiction or under the dominion of the State laws? It

is well established that property in the hands of a receiver of a United States Court is subject to taxation.

Central Trust Co. v. Wabash, &c. Ry. Co., 26 Fed. 11.
George v. St. Louis &c. Cable Co., 44 Fed. 117.
Ex parte Chamberlain, 55 Fed. 704.
Walters v. Western &c. Ry. Co., 68 Fed. 1002.

The same rule is held as to receivers of State Courts.
Spalding v. Comth., 88 Ky., 135.

This is held to be the law notwithstanding there is no process which may issue from a State Court that can reach the property in the hands of the receiver of a United States Court and no State Court can acquire jurisdiction in any way over it. Property in the hands of a receiver of a United States Court is out ~~of~~ the jurisdiction of the State just like the bonded whiskey is out of the jurisdiction. Even more, for it cannot be sold or the title pass subject to the receivership and his possession. The consent of the court must be obtained in all cases, but as to whiskey, all that is required to take it from under the supervision of the officer is the payment of the United States taxes.

Property in the hands of an assignee, a trustee in bankruptcy is liable for State taxation, yet it is out of the jurisdiction of the State Courts.

In re Sims, 118 Fed. Rep. 357.
United States v. Herron, 20 Wall. 251.
Swartz v. Hammer, 194 U. S. 441.

Counsel in brief and petition for rehearing in the Court

of Appeals lays great store by the rulings of this court that Indian lands are not subject to State taxation. He seems to think that the reason of that exemption or immunity arises because the lands are in the possession of a United States officer. An examination of all the cases will show that these Indian lands are held in fee title by the United States, subject to the trust imposed by treaty.

No case can be found where lands have been set out to the Indian in fee, that an exemption from taxation is adjudged.

Plaintiff in error also urges that whiskey in a bonded warehouse cannot be taxed because it is like imports in a bonded warehouse. There is a marked difference between whiskey in bonded warehouse and imported articles, for the corn, or meal and malt, or barley from which it is made, and the water, as well as the other necessary ingredients used in the manufacture, were all in the State before they went under the supervision of the United States officer, but the imported article was never in the State and never liable to taxation until it became a part of the general mass of property in the State. As long as the property retained its distinction as imports it could not be taxed by the State because of the express prohibition of the United States Constitution, and it is held to be imports until the United States tax is paid and it is then withdrawn from bonded warehouse.

But, says plaintiff in error, if all these reasons given be unsound or untenable, we have another equally conclusive. That one is, that this whiskey is not taxable because it is used as an instrument of government. That is to say, it aids the government, in that it pays a tax that is used in support of the United States and is to be classed

as the old United States bank, which was held to be exempt from taxation.

This position, it seems to us, is the least tenable of all, if there can be degree of error. It cannot be said that the United States is engaged or interested in the business of manufacturing whiskey. If the United States was engaged, by its officers, without the aid of private persons, in making whiskey, the product would be the property of the United States and would be exempt from taxation. But instead of aiding or encouraging the business, the government has placed a burden on its manufacture of $1.10 a gallon and thus hinders or obstructs the business.

If the situation was otherwise, if the government aided the distiller in order to obtain the revenue, the position would not be more favorable to the exemption claimed than was that of the Pacific Railroads, which were held not to be exempt from State taxation, although they had been assisted by the United States and were obliged to transport troops for the United States as well as to render other public service. On the theory of being a government agency all the Pacific railroads have at some time sought to escape State taxation, but in every case the effort failed. Some insisted that their charter had been granted by the United States and were Federal corporations as well as government agencies and had been given these lands, sought to be taxed, to aid in the construction of the governmental agency, but it availed nothing. This Court said "show your Act of Congress providing for an exemption from State taxation" and as there was no such provision, there was no exemption. The whole question of the taxation of the Pacific railroad is reviewed in the case of Central Pacific Ry. v.

California, 162 U. S., 91 in which all the cases are referred to and it is held that the State may tax the property of any of these corporations and that such taxation would not hinder the railroad from performing any of its assumed duties to the United States.

The Court said:

> "It may be regarded as firmly settled that although corporations may be the agents of the United States, their property is not the property of the United States but the property of the agents, and that the State may tax the property of the agents, subject to the limitations pointed out in Railroad v. Peniston, 18 Wall, 5."

In the case of Nathan v. Louisiana, 8 How. 73, this Court said:

> "The taxing power of a State is one of its attributes of sovereignty. And when there has been no compact with the Federal goverment, or cessation of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government, and as laid down by this Court, it may be exercised at the discretion of the State * * * *. Whatever exists within its **territorial limits in the form of property,** real or personal, with the exception stated, is subject to its laws; and also the numberless enterprises in which the citizen may be engaged. These are subjects of State regulation and State taxation, and there is no power under the Constitution which can impair this exercise of State sovereignty."

In the recent case of Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395 it was said:

> "The tax was levied in obedience to the law of the State, and the only question here is whether there is anything in the Constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within **territorial jurisdiction** of the State."

That this property is within the territorial limits of Kentucky is conceded, but it is contended that territorial jurisdiction is not enough. It is insisted that there must be **legal** jurisdiction and full governmental dominion and sovereignty to the exclusion of all other goverments—a thing that cannot absolutely exist in this dual government. But in the case of Baltimore Ship-building & Dry Dock Co. v. Baltimore, 195 U. S., 375, the question of governmental agency was presented very strongly in favor of exemption from taxation. In that case property was sold by the United States, a part of Fort McHenry, to the plaintiff in error for the purpose of building a dry dock thereon and was to accord to the United States the right to use forever the dry dock for the examination and repair of vessels belonging to the United States free of charge and if at any time said "property hereby conveyed shall be diverted to any other use than that herein named, or if said dry dock shall be at any time unfit for use for a period of six months or more, the property hereby conveyed, with all its privileges and appurtenances, shall revert to and become the absolute property of the United States." It was insisted that this was a governmental agency and exempt from State taxation but this court held otherwise.

The Court said:

> "It would be a very harsh doctrine that would deny the right of the States to tax lands because of a mere possibility that they might lapse to the United States. The contrary is the law. The condition cannot be extinguished by the State, but the fee is in the dock company, and that can be taxed and, if necessary, sold, subject to the condition * * * *. Finally we are of the opinion that the land is not exempt as an agency of the United States * * *. The United States has no present right to the land, but merely a personal claim against the corporation, reinforced by a condition. But, furthemore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

Counsel seems to rely on the case of Coe v. Errol, 116 U. S., 717, to support his contention and quotes from that opinion.

> "We take it to be a point settled beyond all contradiction or question that a State has jurisdiction of all persons and things within its **territory which do not belong to some other jurisdiction,** such as the representatives of foreign governments with their houses and effects, and property belonging to or in use of the Government of the United States."

That statement settled this case against plaintiff in error. This property and the plaintiff in error are

within the territorial limits of Kentucky and do not and never did belong to any other jurisdiction.

While it is true that the United States levies a tax on the whiskey that does not transfer the property nor its ownership to some other jurisdiction. If a controversy should arise over the ownership of whiskey in bond, by reasons of transfers or assignment of warehouse receipts, or a controversy arise by reason of loss by fire or other casualty, or a suit for damages by reason of personal injury caused by negligence in caring for the whiskey, it could hardly be contended that the United States Courts would have jurisdiction thereof as a case arising under the laws of the United States. Yet, if whiskey in a bonded warehouse belongs to the jurisdiction of the United States and is out of that of the State it is because of some Statute of the United States, and we feel authorized to say that none exists, else the diligence of learned Counsel would have discoverd it and pleaded it in this case.

As we see it there is nothing in the contention. Plaintiff in error claims exemption or immunity from taxation, yet shows no express, or implied law sustaining such contention.

> "The first universal rule of construction is that exemptions whether statutory or constitutional are to be strictly construed against the exemption and in favor of the right to tax; and that no property or person is to be exempted unless the intention to exempt such property or person clearly appears in some statute or constitutional provision. The relinquishment or curtailment of the power of taxation is never presumed. A deliberate purpose to

exempt must appear from the express language of the law. This rule is so universally recognized that citation of authority to sustain it is almost unnecessary."

Gray on Limitations of Taxing Power, Section 1321.

"Taxes being made the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes or any portion of his property must, on that account, be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim: No implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power."

Bank v. Tennessee, 161 U. S., 134.

Keeping in mind this well settled principle, we ask where is the authority for the exemption from taxation claimed by plaintiff in error?

The Constitution and Statutes of Kentucky, if they were open to examination here, provide for taxation of all property not specially named as exempted. This class is not named. The laws of the United States relating to the manufacture and taxation of distilled spirits make no provision for exemption or immunity from State taxation; in fact, say nothing on the subject. Whiskey in a bonded warehouse is not a governmental agency. The

United States does not own the whiskey and it is not public property in any sense. But this question is not open. The case of Carstairs v. Cochran, 193 U. S., 10, is decisive of the case at bar. The statement by Mr. Justice Brewer is,

> "By chapter 704 of the Laws of Maryland 1892, as amended by chap. 320, Laws 1900, the general assembly of that State provided for the assessment and collection of taxes on liquors in bonded warehouses within the State. The proprietors of such warehouses were required to pay the taxes, and given a lien on the property therefor. This legislation was sustained by the Court of Appeals of the State (95 Md. 488) to review whose judgment this writ of error was sued out."

The basis of the writ of error was there, as here, a supposed violation of the 14th amendment to the Constitution of the United States.

The opinion in that case is so short that we insert it in full.

Mr. Justice Brewer delivered the opinion of the court:

> "That the statutes in question do not conflict with the Constitution of Maryland is settled by the decision of its highest court.
>
> "Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited:
>
> "Backus v. Ft. Street Union Depot Co. 169 U. S. 557-566, 42 L. ed. 853-858, 18 Sup. Ct. Rep. 445; Rasmussen v. Idaho, 181 U. S. 198-200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594.

"A state has the undoubted power to tax private property having a situs within its territorial limits; and may require the party in possession of the property to pay the taxes thereon. 'Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.'

"State tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed.179, 186. 'Statutes sometimes provide that tangible personal property shall be assessed wherever in the State it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is a resident of the State or not.' I Cooley, Taxn. 3d ed. p. 653. See also Coe v. Errol. 116 U.S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Marye v. Baltimore & O. R. Co. 127 U. S. 117-123, 32 L. ed. 94-96, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 22, 36 L. ed. 601, 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Savings & Loan Soc. v. Multnomah County, 169 U. S. 421-427. 42 L. ed. 803-805, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; State Board vs. Comptoir National D'Escompte, 191 U. S. 388, ante, p. 109. 24 Sup. Ct. Rep. 109; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

"That under Federal legislation distilled spirits may be left in a warehouse for several years, that there is no specific provision in the statutes in question giving to the proprietor who pays the taxes a right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been issued, do not effect the question of the power of the State. The State is under no obligations to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein, but it is their business, if they wish further protection than the lien given by the statute, to make their contracts accordingly.

"We see no error in the judgment of the Court of Appeals, and it is affirmed."

The same question here presented came before the Circuit Court for the Eastern Dist. Ky. in the the case of Anderson County v. Kentucky Distilleries & N. Co. in 146 Federal Reporter 999, and Mr. Justice Cochran held that the case of Carstairs v. Cochran, *supra*, was decisive of the case, and sustained a demurrer to a plea identical with that of plaintiff in error in this case. The same Court had previously decided the same question in the same way in the case of Kessler & Co. v. Town of Tyrone, (unreported case).

In the opinion of the Court of Appeals herein the opinion of this Court in Carstairs v. Cochran is relied on as conclusive of any question presented. The only difference between the law of Maryland and of Kentucky is that in Maryland the taxes are required to be paid annually and without reference to the bonded period, while

in Kentucky the taxes are required to be paid at the end of the bonded period and after the United States taxes have been paid.

Under the Maryland statute the taxes are required to be paid by the warehouseman before he can coerce repayment: here is not required till the warehouseman can force repayment by sale of the whiskey which is then freed from the claim of the United States. There can be no question as to the merits being in favor of defendant in error.

But whatever the merits may be, we insist that the writ of error should be dismissed for want of a "Federal question" being presented by the record. No United States Statute or constitutional provision is relied on in the answer or adjudicated upon in the opinion of the Court of Appeals as to the exemption or immunity claimed.

A dismissal or affirmance is respectfully asked.

JOHN W. RAY,
*For Defendant in Error.*

N. B. HAYS, Atty. Gen.
*Of Counsel.*

# APPENDIX.

## A.

(Kentucky Statutes.)

§4768. **Warehousemen—Who Deemed,** Any person or corporation who shall receive cotton, tobacco, pork, grain, corn, wheat, rye, oats, hemp, whiskey, coal, or any kind of produce, wares, merchandise, commodity, or any other kind or description of personal property or thing whatever in store, or undertake to receive or take care of the same, with or without compensation or reward therefor, shall be deemed and held to be warehousemen.

§4770. **Receipts Negotiable and Transferable.** All receipts issued by any warehousemen as provided by this chapter shall be negotiable and transferable by indorsement in blank, or by special indorsement, and with like liability as bills of exchange now are, and with like remedy thereon.

§4778. **Sale of Property to Pay Storage**—Notice. Any property in a warehouse upon which the charges have not been paid for twelve months after the same have become due, unless otherwise provided by contract, the warehouseman may sell such property, or enough thereof to pay the charge, at public auction, at the warehouse or at the court-house door of the county in which the warehouse is situated. Before any such sale shall be made, the warehouseman shall cause the sale of the property to be advertised for not less than twenty days before the day of the sale, by printed notices posted at the door of the court-house of the county, and in three or

more public places in the county where the sale is to take place, and by having such notice published at least once a week for at least three weeks in a newspaper of general circulation in the county where the warehouse is situated. Such notice shall contain the day and place of sale, a description of the property to be sold, if known; if not, a description of the package in which it is contained, the amount of charges and the name and place of residence of the owner, if known; and the warehouseman, at least ten days before the day of sale, shall mail to the owner a notice of the time and place of sale with a description of the article to be sold and amount of charges.

§4110. **Taxes When Due on Spirits on Which Government Tax not Paid—Interest on.** Taxes on distilled spirits which may be assessed while in a bounded warehouse, and on which the United States Government tax has not been paid, or will not become due before the first day of March after the assessment, shall be due on the second day of January, May and September next after the said government tax becomes due or be paid or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear legal interest until paid.

§4105. **Distiller and Bonded Warehouse Owner to Report to Auditor.**—Every owner or proprietor of a distillery bonded warehouse in which distilled spirits are stored shall, between the fifteenth day of September and the first day of October of each year, report to the Auditor of Public Accounts, in writing, sworn to by the person making the report; or, if the

owner or proprietor of such warehouse be a corporation, the report shall be made and sworn to by its principal officer or manager in charge. Such report shall show the quantity and kind of spirits in such warehouse on the fifteenth day of September in the year the statement is required to be made, the dates when made, the serial number of packages in which it is contained; the county, city, town or taxing district in which the warehouse is situated; whether or not the United States Government tax has been paid thereon, if not, the date of expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the Auditor may require.

§4109. **Custodian of Spirits Liable for Tax—Lien.** Any person or corporation having the custody of such spirits on the fifteenth day of September in the year the assessment is made, shall be liable for all taxes due thereon, together with all interest and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from the day of payment.

§4111. **Owner or Proprietor of Warehouse to Report and Pay State Tax.** Every owner or proprietor of a bonded warehouse in which distilled spirits may be stored, as contemplated in the preceding section, shall, on the first day of January, May and September next after said government tax shall have been paid, become due, or be removed from the warehouse, make and transmit to the Auditor of Public Ac-

counts and the clerk of the county court in which the spirits may have been at the time of the assessment a statement, sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the government tax has been paid or has become due, and what spirits have been removed from the warehouse during the preceding four months, the years in which such spirits were assessed for taxation, the serial number of packages in which it is contained, and the county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interest on such spirits due the State, county, taxing district, city or town to the officer entitled to receive the same.

§4112. **Penalty for Failure to Pay Tax—Collection.** On the failure of any owner or proprietor of any such warehouse to pay the taxes and interest, within five days after the same becomes due, he shall be deemed delinquent, and a penalty of eight per cent on each year's taxes due on the spirits shall attach, and the officer authorized to collect such taxes shall at once cause such proceeding to be instituted for the collection of such taxes, with such interest and penalties as may be provided by law for the collection of other delinquent taxes.